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IN THE

Supreme Court of the United States

UNITEDHEALTH GROUP, INC., f.k.a. United HealthCare Corporation, UNITEDHEALTHCARE, INC., HUMANA INC., HUMANA HEALTH PLAN, INC., FOUNDATION HEALTH SYSTEMS, INC., n.k.a. Health Net, Inc., PACIFICARE HEALTH SYSTEMS, INC., PACIFICARE OPERATIONS, INC., THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, WELLPOINT HEALTH NETWORKS INC.,

Petitioners,

v.

LEONARD J. KLAY, M.D., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In deciding a motion to certify a class action under FED. R. CIV. P. 23, may a court presume that the plaintiff's allegations are true or does the rigorous analysis demanded by this Court require the certifying court to carefully review the evidentiary record to evaluate whether the elements of Rule 23 have been satisfied?

2. In a nonsecurities fraud case in which the plaintiff must prove individual reliance, may a court certify a class action by finding that the predominance requirement is satisfied by presumed or circumstantial proof of reliance even when the defendants assert their right to insist on individualized proof of reliance?

PARTIES TO PROCEEDINGS BELOW AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit were: (a) plaintiffs-appellees Charles B. Shane, M.D.; Jeffrey Book, D.O.; Dennis Breen, M.D.; Michael Burgess, M.D.; Edward L. Davis, D.O.; Lance R. Goodman, M.D.; H. Robert Harrison, M.D.; Glenn L. Kelly, M.D.; Leonard J. Klay, M.D.; Eugene Mangieri, M.D.; Kevin Molk, M.D.; Martin Moran, M.D.; Manuel Porth, M.D.; Thomas Backer, M.D.; David Boxstein, M.D.; Susan Hansen, M.D.; Andres Taleisnik, M.D.; Julio Taleisnik, M.D.; Roger Wilson, M.D.; Navid Ghalambor, M.D.; California Medical Association; Texas Medical Association; Medical Association of Georgia; Florida Medical Association; Louisiana State Medical Society; and Denton County Medical Society, and (b) defendants-appellants Humana Health Plan, Inc., and Humana Inc., Foundation Health Systems, Inc., n.k.a. Health Net, Inc., PacifiCare Health Systems, Inc., PacifiCare Operations, Inc., n.k.a. PacifiCare Health Plan Administrators, Inc., The Prudential Insurance Company of America, UnitedHealth Group Incorporated, f.k.a. United HealthCare Corporation, UnitedHealthcare, Inc. and WellPoint Health Networks Inc.

This petition is being filed on behalf of Humana Health Plan, Inc., Humana Inc., Foundation Health Systems, Inc., n.k.a. Health Net, Inc., PacifiCare Health Systems, Inc., PacifiCare Operations, Inc., n.k.a. PacifiCare Health Plan Administrators, Inc., The Prudential Insurance Company of America, UnitedHealth Group Incorporated, f.k.a. United HealthCare Corporation, UnitedHealthcare, Inc., and WellPoint Health Networks Inc.

As of June 2004, the following two companies owned 10% or more of the common stock of Humana Inc.: Wellington Management Company, LLP, and Barclays Global Investors, NA (and related companies). No publicly held companies

own 10% or more of PacifiCare Health Systems, Inc., UnitedHealth Group Incorporated, or WellPoint Health Networks Inc.

Humana Inc. is the parent company and owns 100% of Humana Health Plan, Inc., and is a publicly traded corporation on the New York Stock Exchange. PacifiCare Operations, Inc., n.k.a. PacifiCare Health Plan Administrators, Inc., is owned 100% by PacifiCare Health Systems, Inc., a publicly held company. UnitedHealthcare, Inc. is owned 100% by United HealthCare Services, Inc., which in turn is owned 100% by UnitedHealth Group Incorporated, a publicly held company. Prudential Financial, Inc., is the parent company of Prudential Holdings, LLC, which in turn is the parent company of The Prudential Insurance Company of America. There is no parent company for WellPoint Health Networks Inc.

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PETITION FOR A WRIT OF CERTIORARI

The federal courts of appeals are divided over the proper standard for determining whether a class action may be certified under Rule 23—namely, whether a district court may certify a class based merely on the plaintiff's allegations or whether the court must look beyond the pleadings and rigorously evaluate the evidentiary record to determine whether the requirements of Rule 23 have been satisfied. In balancing the Court's dual commands that a district court must perform "a rigorous analysis" to determine whether the

prerequisites of Rule 23 have been satisfied, *Gen. Tel. Co. of the Southwest* v. *Falcon*, 457 U.S. 147, 161 (1982), but not "conduct a preliminary inquiry into the merits," *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974), the First, Third, Fourth, Fifth, and Seventh Circuits properly require a rigorous demonstration of "actual, not presumed, conformance" with Rule 23.[1] *Falcon*, 456 U.S., at 160. That is, the class representatives must do more than allege compliance with Rule 23; they must actually demonstrate that the case may properly be tried on a classwide basis consistent with the rule and due process. A court may not simply accept the plaintiffs' allegations as true, but must undertake a careful consideration of the claims and defenses, as well as any affirmative defenses and counterclaims, to determine whether the disposition of the class representatives' claims may, in fairness to both sides, be applied across the class.

The Second, Ninth, and Tenth Circuits, in contrast, have used a more lenient standard that allows a district court to accept the class representatives' allegations as true and, consequently, permits class certification based largely on the plaintiffs' ability to plead, rather than prove, compliance with the rule.[2] That standard improperly replaces the required rigorous analysis with presumed compliance with Rule 23,

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[1] *See Gariety* v. *Grant Thornton, LLP*, 368 F.3d 356, 365-66 (CA4 2004); *Newton* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 166-68 (CA3 2001); *Sandwich Chef of Tex., Inc.* v. *Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 221 (CA5 2003); *Szabo* v. *Bridgeport Mach., Inc.*, 249 F.3d 672, 677 (CA7 2001); *Waste Mgmt. Holdings, Inc.* v. *Mowbray*, 208 F.3d 288, 298 (CA1 2000).

[2] *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 135 (CA2 2001); *Caridad* v. *Metro-North Commuter R.R.*, 191 F.3d 283, 292-93 (CA2 1999); *J.B. ex rel. Hart* v. *Valdez*, 186 F.3d 1280, 1290 n.7 (CA10 1999); *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 691 F.2d 1335, 1342 (CA9 1982); *Shelter Realty Corp.* v. *Allied Maint. Corp.*, 574 F.2d 656, 661 n.15 (CA2 1978); *Blackie* v. *Barrack*, 524 F.2d 891, 901 n.7 (CA9 1975).

permits a party to plead generalized commonalities that cannot be supported by the record, and impermissibly encourages district courts to certify now and worry later about the ramifications of an erroneous certification order.

The Eleventh Circuit erroneously applied that more lenient standard in this case. The court of appeals affirmed the certification of a nationwide class of *every* physician who has treated *any* patient who is a member of *any* health care plan insured by *any* of the defendants, who are among the largest managed care companies (MCCs) in the United States. In this wide-ranging challenge to the managed care industry, the RICO conspiracy claims found by the court of appeals to be proper for class resolution encompass literally tens of billions of physician-patient interactions since 1990, and the scope and complexity of both the class and the issues it seeks to resolve are unparalleled. Yet, in affirming the district court's certification order on those claims, the court of appeals made no reference to the record and failed to evaluate how the alleged claims would in fact be tried, but instead concluded that the plaintiffs' *allegations* of a national conspiracy, a pattern of racketeering, and a "managed care enterprise" were sufficient to permit a common, classwide resolution.

Moreover, in the course of affirming the certification of the RICO conspiracy class, the court of appeals also deepened a conflict among the circuits by holding that individual issues of reliance did not preclude class certification. The court expressly rejected the holdings of the Fifth Circuit recognizing that class certification can never be proper when individual reliance is in dispute, and placed itself more broadly in conflict with the similar holdings of the Second, Fourth, Sixth, and Eighth Circuits that have clearly rejected class certification on predominance grounds when each class member must demonstrate individual reliance on the alleged misrepresentations.

The class action procedures in Rule 23 serve a beneficial and useful purpose, but they also impose high costs on the judicial system and create a significant potential for abuse. Whether to certify a class action is a decision with monumental consequences, and the bet-the-company risks associated with a class-action trial can be so great that many defendants choose to settle rather than try even exceptionally weak claims. There is a grave potential for the filing of weak or frivolous claims by plaintiffs hoping that a settlement can be forced by obtaining class certification. The only way to protect against those abuses is for district courts to carefully and strictly ensure actual compliance with the requirements of Rule 23.

CITATION OF OPINIONS AND ORDERS

The court of appeals's opinion, App. 40a, is reported at 382 F.3d 1241 (CA11 2004). The opinion of the district court, App. 1a, is reported at 209 F.R.D. 678 (S.D. Fla. 2002).

JURISDICTION

The Eleventh Circuit delivered its judgment and opinion on September 1, 2004. The Court has jurisdiction under 28 U.S.C. §1254.

RULE INVOLVED

The appendix includes the text of Federal Rule of Civil Procedure 23. App. 97a.

STATEMENT OF THE CASE

This consolidated multidistrict nationwide class action suit is currently asserted by thirteen individually named plaintiff physicians and five state and regional medical association plaintiffs on behalf of virtually every physician in the country (over 600,000 physicians) against eight of the largest MCCs.

The complaint asserts claims arising under RICO, including conspiracy and aiding-and-abetting claims, and various state statutory and common-law claims.[3] Respondents accuse the MCCs of improperly paying claims submitted by physicians for the provision of medical services to the MCCs' subscribers as part of a nation- and industry-wide scheme to "systematically deny, delay and diminish the payments due to doctors." Specifically, respondents allege that the MCCs represent to physicians—through deceptive "agreements, manuals, correspondence, patient lists, payments, explanations of benefits, reports, data, summaries, oral and written statements, faxes, and plan materials" mailed or wired to class members since 1990—that coverage and treatment decisions and payments to physicians are made solely on the basis of medical necessity and the applicable Current Procedural Technology (CPT) codes,[4] rather than the reimbursement obligations tied to each MCC's own policies and the physicians' provider agreements. Respondents further generally allege that the defendants defrauded them by misrepresenting that "defendants would honestly pay physicians," App. 62a, and that the MCCs have conspired not to pay physicians "honestly" by failing to pay physician claims submitted in accordance with CPT.

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[3] Respondents' substantive causes of action are for violations of RICO, *see* 18 U.S.C. §1962(a) and (c), the Employee Retirement Income and Security Act, *see* 29 U.S.C. §1132(a)(1) and (3), and various state prompt-pay and deceptive trade practices statutes, as well as for breach of contract and unjust enrichment. Respondents also allege causes of action for conspiring to violate RICO, *see* 18 U.S.C. §1962(d), and aiding-and-abetting RICO violations (in alleged violation of 18 U.S.C. §2).

[4] CPT codes, of which there are thousands, are numerical descriptors developed and promulgated by the American Medical Association to describe virtually every known medical treatment, whether individually or in combination with other procedures. Other descriptors for medical services rendered by physicians have also been developed by the federal government and physician specialty societies.

The parties engaged in limited discovery for class certification briefing and oral argument, which included depositions of respondents and the MCCs' corporate representatives, the submission of witness declarations, and the production of tens of thousands of documents by the MCCs. The facts developed during class-certification discovery demonstrated innumerable individualized variances both within each MCC and among the MCCs over the lengthy class period relating to, among other things, claims-processing practices, contractual arrangements and provisions,[5] and disclosures and other communications to physicians. *See, e.g.*, D.E. 634, R. McCaskill Decl. (providing specific examples of differences among various United physician contracts and provider manuals regarding, among other things, coding and reimbursement policies, care guidelines, and preauthorization requirements); D.E. 594, N. Freeman Decl. (describing how PacifiCare's physician compensation arrangements and contracting practices differ among regions based on local market conditions, state laws, and regulatory oversight); D.E. 638, S. Erwin Decl. (attesting to differences in claims processing and marketing materials across Health Net/Foundation subsidiaries).[6]

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[5] Collectively, the MCCs' subsidiaries have entered into hundreds of thousands of contracts with physicians across the country. These contracts are often heavily negotiated and vary significantly on fundamental terms, including fee schedules, reimbursement rates, claim-submission requirements, and claim-payment timeframes. These variances are generally the result of, among other things, applicable federal and state laws, the physician's geographic market of practice, the physician's preferences and specialty, and the timeframe of contract negotiation. Many, if not most, of those contracts also contain binding arbitration provisions that were intended to ensure that reimbursement disputes are resolved without the need for litigation. *See PacifiCare Health Sys., Inc.* v. *Book*, 538 U.S. 401 (2003).

[6] Citations to documents in the district court record are to the specified docket entry.

The evidence presented to the district court as a result of class-certification discovery also revealed, contrary to the allegations in the complaint, that the individual respondents understood that they would be paid in accordance with the MCCs' payment policies under their individual contracts and did not uniformly rely on any alleged general representation that they would be paid under different payment procedures for medical services they rendered. *See, e.g.*, D.E. 638, Tab A (D. Breen depo.), at 203-04 (denying that defendants provided him with any document or statement containing an intentional misrepresentation); D.E. 661, K. Nowicki Decl., Ex. B (M. Porth depo.), at 141, 255-56 (stating that defendants had not "defrauded" or "lied" to him).

Respondents sought to certify: (1) a "Global Class" of "[a]ll medical doctors who provided services to any person insured by any defendant from August 14, 1990 to [September 26, 2002]," who asserted RICO conspiracy and aiding-and-abetting claims; (2) a "National Subclass" of doctors who asserted claims for breach of contract, unjust enrichment, and violations of RICO and state prompt-pay laws, but only to the extent the doctors were "not bound to arbitrate" such claims; and (3) a "California Subclass," who asserted claims arising under CAL. BUS. & PROF. CODE §17200, but only to the extent the doctors were "not bound to arbitrate" these claims. App. 48a.

On September 26, 2002, the district court certified a nationwide RICO class of virtually all physicians in the country, who cumulatively had submitted to the MCCs tens of billions of claims dating back to 1990. In this regard, the district court noted, "[b]ecause [] a common scheme is alleged and demonstrated by the evidence here, there are no individual issues of reliance." App. 37a. Thus, the district court found that the "common issues and common scheme" alleged and proposed by respondents predominated. *Id.* The district court also certified the proposed nationwide state-law

subclass of physicians "not bound to arbitrate" their claims with respect to respondents' state-law prompt pay, breach of contract, *quantum meruit*, and unjust enrichment claims, along with those physicians "not bound to arbitrate" their claims brought by the California subclass. The MCCs petitioned the court of appeals for review pursuant to FED. R. CIV. P. 23(f), and the petition was granted.

On September 1, 2004, the court of appeals affirmed the certification of the nationwide RICO class and reversed the district court's certification of respondents' state claims. App. 41a. In affirming the certification of the RICO class, the court of appeals—contrary to the approach used by most courts of appeals—relied solely on the allegations contained in respondents' complaint, rather than the record evidence presented by the MCCs. In addition, although the court of appeals recognized that "each plaintiff must prove his own reliance in this case" and that reliance could not be "presumed," it ultimately concluded—in conflict with the holdings of other courts of appeals, *see, e.g.*, App. 62a (citing *Castano* v. *Am. Tobacco Co.*, 84 F.3d 734, 745 (CA5 1996); *Simon* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 482 F.2d 880 (CA5 1973))—that the need for individualized proof of reliance would not bar class certification. App. 62a-64a.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD RESOLVE THE SPLIT AMONG THE COURTS OF APPEALS OVER WHETHER A COURT MAY ACCEPT AS TRUE THE PLAINTIFFS' ALLEGATIONS IN DETERMINING WHETHER TO CERTIFY A CLASS ACTION.

This case presents a recurring and intractable clash over the standards for certifying a class action under Rule 23. At least five courts of appeals have held that a district court can determine whether a case satisfies the requirements of Rule 23 only by reviewing all the evidence before the court—both

favorable and unfavorable—and making findings on whether the evidence to be offered at a trial of the case will be amenable to classwide presentation and resolution. Four other courts of appeals, however, have interpreted a statement by the Court warning against delving into the merits at the certification stage as permitting a district court to accept as true the allegations in a plaintiff's complaint, giving little or no weight to defense evidence that contradicts or undermines the plaintiff's allegations. The Court should resolve this split among the courts of appeals because the split is deep and mature, and the underlying issue is often dispositive of whether a class can be certified (*e.g.*, in nonsecurities fraud cases such as this one, plaintiffs can easily allege, but rarely can prove, that they all received and relied upon uniform misrepresentations). Resolving this conflict is an issue of imperative public importance because permitting classes to be certified based on allegations rather than evidence produces improper certifications that impose tremendous social costs, frequently forces defendants to settle without regard for the merits, and encourages the filing of frivolous or weak class claims intended primarily to force a defendant into settlement before any court has evaluated the strength of the class plaintiffs' evidence.

The general principles for certifying a class are not in dispute. A district court has discretion to certify a class if the requirements of Rule 23 are satisfied. Every class action must satisfy Rule 23(a)'s four requirements: numerosity, typicality, commonality, and adequacy of representation. FED. R. CIV. P. 23(a). The proposed class must also satisfy the requirements of one of the subsections of Rule 23(b). When claimants seek primarily money damages, as in this case, they must demonstrate that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members" and that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." FED. R. CIV. P. 23(b)(3).

The predominance and superiority requirements involve an especially fact-intensive analysis and, therefore, are often the source of conflict about the propriety of class certification. When that happens, the defense will challenge the court to more carefully evaluate the evidentiary record, not to decide whether the plaintiffs are likely to win or lose, but rather to determine how the asserted claims will actually be tried and whether predominance and superiority can be demonstrated in light of the actual record. The selection of the class-certification standard to be applied may itself be determinative of the certification decision, and a standard that sets the bar too low will encourage forum shopping and emphasize artful pleading over actual compliance. Given the importance of the certification decision and the widely recognized economic pressure and risks of abuse inherent in an improper class certification, the Court should resolve the longstanding and deepening conflict regarding the proper standard for certifying a class action.

A. The Courts of Appeals Disagree About Whether *Eisen* Permits Courts to Accept Claimants' Allegations as True in Assessing Certification.

The Eleventh Circuit's holding in this case demonstrates the need for this Court to resolve the deep and intractable split over the correct standard to apply in determining class certification. The federal courts disagree about the proper sources to consider and the weight to be given each source when determining whether Rule 23's requirements have been satisfied. Many of these disagreements derive from the perceived tension between the Court's decisions in *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974), and *Gen. Tel. Co. of the Southwest* v. *Falcon*, 457 U.S. 147 (1982).

The Court's 1974 decision in *Eisen* involved alleged violations of antitrust and securities laws. After conducting a preliminary hearing on the merits and concluding that the merits favored the claimants, the district court assigned ninety

percent of the notice costs to the defendants. The court of appeals reversed, and the Court affirmed, concluding that district courts should not "conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Eisen*, 417 U.S., at 177. That language, while arising in a case involving unusual circumstances, was quickly interpreted by some courts not only to prohibit a preliminary determination of whether the putative class representatives are likely to win or lose, but also to prevent a careful analysis of the claims and defenses presented in the case to determine whether, in fact, they may be actually tried in a way that is compliant with the requirements of Rule 23.[7] *See, e.g.*, *Shelter Realty Corp.* v. *Allied Maint. Corp.*, 574 F.2d 656, 661 n.15 (CA2 1978); *Blackie* v. *Barrack*, 524 F.2d 891, 901 & n.17 (CA9 1975).

The Court's decision in *Falcon*, however, appears to preclude an expansive reading of *Eisen*. *Falcon* explained that class determinations generally involve considerations that are "enmeshed in the factual and legal issues" of the plaintiff's cause of action. 457 U.S., at 160 (quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 469 (1978)). Although the Court recognized that there might be occasions in which the certification decision could be determined from the pleadings, the Court also recognized that in many cases "it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Id.* The Court reiterated that "actual, not presumed, conformance with Rule 23(a) remains, however, indispensable," *id.*, and that a court must perform a "rigorous analysis" before deciding that class certification is appropriate. *Id.*, at 161.

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[7] "The Court did not limit its holding to the unusual facts of the case . . . . Instead, it used expansive and seemingly categorical language that has had a profound effect on class action practice ever since." Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1265 (2002).

In the intervening two decades since *Falcon*, the Court has not clarified the extent, if at all, to which *Eisen* prevents courts from examining factual evidence about the parties' claims and defenses and how they will actually be tried as part of the rigorous analysis necessary in determining whether the class-certification requirements are satisfied. As a result, "the federal courts have struggled to chart a middle course between *Falcon*'s requirement of a rigorous analysis and *Eisen*'s prohibition of a preliminary inquiry into the merits." Bone & Evans, *supra* note 7, at 1268. The courts of appeals' long disagreement about the proper standard for class certification has resulted in an incoherent body of class-certification decisions.[8] The disagreement among the circuits has become more obvious and pronounced, particularly now that Rule 23(f) allows the courts of appeals to accept interlocutory appeals from class-certification decisions. *See Tardiff* v. *Knox County*, 365 F.3d 1, 5 n.5 (CA1 2004) ("The circuits are also divided.").

The Court should resolve the conflict among the circuits and clarify the standard that trial courts must apply to determine if Rule 23's requirements for class certification have been met. The Court has stated that Rule 23(b)(3)'s predominance requirement is "far more demanding" than Rule 23(a)'s commonality requirement. *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 624 (1997). If a court may accept a claimant's allegations as true, then *Amchem* merely imposes a heightened pleading requirement. The Court should clarify

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[8] For example, in *Shelter Realty Corp.*, the Second Circuit permitted antitrust claimants to obtain class certification based merely on allegations that defendants conspired to fix prices. 574 F.2d, at 661. By contrast, the Fifth Circuit, in *Alabama* v. *Blue Bird Body Co.*, 573 F.2d 309 (CA5 1978), reversed a class certification when, despite claimants' allegations of a nationwide conspiracy, the evidence "seem[ed] to indicate that proof of the conspiracy cannot be made in a manner common to all members of the class." *Id.*, at 321.

that Rule 23 requires more than heightened pleading; it requires a searching inquiry, going beyond the pleadings to test compliance with Rule 23.[9]

The disagreement between the courts of appeals centers on whether courts should probe behind the factual allegations and examine the evidence. The First, Third, Fourth, Fifth, and Seventh Circuits have adopted a circumspect reading of *Eisen* and tight controls for assuring that Rule 23's certification requirements are met. In *Waste Mgmt. Holdings, Inc.* v. *Mowbray*, 208 F.3d 288 (CA1 2000), for example, the First Circuit recognized that district courts "must formulate some prediction as to how specific issues will play out in order to determine whether common or individual issues predominate in a given case." *Id.*, at 298. *Eisen*, the court explained, "does not foreclose [this] consideration." *Id.*; *see also Tardiff*, 365 F.3d, at 4-5 ("It is sometimes taken for granted that the complaint's allegations are necessarily controlling; but class action machinery is expensive and in our view a court has the power to test disputed premises early on if and when the class action would be proper on one premise but not another.").

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[9] The 2003 amendments and accompanying advisory notes to Rule 23 also provide strong support for the searching inquiry required by most circuits. Rule 23(c) originally required certification orders to be made "as soon as practicable after commencement of [the] action." But the 2003 amendments to Rule 23(c) now require a court to determine class certifications "at an early practicable time," and the advisory committee explained its purpose for clarifying the rule:

> "Time may be needed to gather information necessary to make the certification decision. Although an evaluation of the probable outcome on the merits is not properly part of the certification decision, discovery in aid of the certification decision often includes information required to identify the nature of the issues that actually will be presented at trial. *In this sense it is appropriate to conduct controlled discovery into the "merits," limited to those aspects relevant to making the certification decision on an informed basis.*" FED. R. CIV. P. 23 advisory committee's notes to 2003 amendments (emphasis added).

The Fifth Circuit has been even more explicit about the need for a rigorous analysis of whether the requirements for class certification are met. In *Sandwich Chef of Tex., Inc.* v. *Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205 (CA5 2001), the court reversed class certification in a RICO fraud action after considering the defendants' evidence on predominance. *Sandwich Chef* emphasized that "going beyond the pleadings is necessary, as a court must understand the claims, *defenses*, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues." *Id.*, at 220. The district court must know how the case will actually be tried and account for individual issues. Similarly, *Castano* explained that it is necessary to go beyond the pleadings to "understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues" because failing to do so "would write the predominance requirement out of the rule." 84 F.3d., at 744-45.

Like the Fifth Circuit, the Third, Fourth, and Seventh Circuits have also been emphatic in requiring a meaningful precertification evaluation of the class requirements. For example, in reviewing the certification of a class under an approach similar to the one applied by the Eleventh Circuit, the Seventh Circuit in *Szabo* v. *Bridgeport Mach., Inc.*, 249 F.3d 672 (CA7 2001), reversed class certification, explaining that the district court "certified the class without resolving factual and legal disputes that strongly influence the wisdom of class treatment." *Id.*, at 675. The court held that *Eisen* prevents a court only from "say[ing] something like 'let's resolve the merits first and worry about the class later' . . . or 'I'm not going to certify a class unless I think that the plaintiffs will prevail.'" *Id.*, at 677. "[N]othing in the 1966 amendments to Rule 23, or the opinion in *Eisen*, prevents the district court from looking beneath the surface of a complaint to conduct the inquiries identified in that rule and exercise the discretion it confers." *Id.* District courts should resolve all

factual and legal disputes on which the Rule 23 inquiries turn, and if these inquiries "overlap the merits," as they often will, "then the judge must make a preliminary inquiry into the merits." *Id.*, at 676.

Both the Third and Fourth Circuits have strongly endorsed that approach. *See Johnston* v. *HBO Film Mgmt., Inc.*, 265 F.3d 178, 189 (CA3 2001) (holding that it is "necessary" for the district court to base certification decisions on the "factual record" rather than mere allegations); *Gariety* v. *Grant Thornton, LLP*, 368 F.3d 356, 365-66 (CA4 2004) (holding that simply accepting the plaintiffs' allegations is inconsistent with the requirements of Rule 23 and explaining that the certification factors must be addressed through findings).

The Fourth Circuit has explained that "the factors spelled out in Rule 23 must be addressed through findings, even if they overlap with issues on the merits." *Id.*, at 366. In that context, "Rule 23(b)(3) on its face requires the court to '*find* [ ] that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members.'" *Id.*, at 365 (emphasis and alteration in original). A proper Rule 23 analysis "must focus on the requirements of the rule, and if findings made in connection with those requirements overlap findings that will have to be made on the merits, such overlap is only coincidental." *Id.*, at 366. Otherwise, "every complaint asserting the requirements of Rule 23(a) and (b) would automatically lead to a certification order." *Id.*, at 365.

In contrast to that rigorous approach, the Second, Ninth, Tenth—and now the Eleventh—Circuits have applied a more expansive reading of *Eisen* that permits the courts to accept the plaintiffs' allegations as true for purposes of assessing the propriety of class certification. Those courts have suggested that trial courts may accept as true allegations of fact directed toward the class-action inquiry, even when the allegations are

not supported by the record.[10] The Second Circuit, for example, has held that courts should accept claimants' allegations as true and resolve factual disputes in favor of claimants when deciding whether to certify a class.[11] In *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124 (CA2 2001), the court of appeals addressed whether the district court should have weighed two experts' competing views on whether the claimants' antitrust claims could be tried as a class without devolving into a series of individualized mini-trials. Although the evidence concerned the merits of the Rule 23 factors, rather than the merits of the underlying claims, the court repeated *Eisen*'s maxim that "a motion for class certification is not an occasion for examination of the merits of the case" and held that the district court was required to defer to the claimants' class evidence unless it was "so flawed that it would be inadmissible as a matter of law." *Id.*, at 135.

Similarly, in *Caridad* v. *Metro-North Commuter R.R.*, 191 F.3d 283 (CA2 1999), the Second Circuit reversed a denial of class certification because, based on its view of *Eisen*, the district court's "weighing of the evidence [on commonality wa]s not appropriate at this stage in the litigation." *See id.*, at 292-93; *see also Shelter Realty Corp.*, 574 F.2d, at 661 n.15 ("[I]t is proper to accept the complaint allegations as true in a class certification motion.").

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[10] The cases themselves do not always make entirely clear which allegations—factual allegations directed at the merits or at compliance with Rule 23—the courts have accepted as true. Indeed, the very conflation by those circuits of a searching inquiry into compliance with Rule 23 with an inquiry into the merits is likely a strong factor in those circuits' misinterpretation of *Eisen*.

[11] *See, e.g.*, *Shelter Realty Corp.*, 574 F.2d, at 661 n.15; *cf. Korn* v. *Franchard Corp.*, 456 F.2d 1206, 1208-09, 1213 (CA2 1972) (advocating a liberal rather than restrictive construction of the Rule 23 requirements); *Marisol A.* v. *Giuliani*, 126 F.3d 372, 377 (CA2 1997) (same).

The Ninth and Tenth Circuits also appear to accept claimants' allegations as true when reviewing certification decisions, thus limiting a court's ability to fully evaluate whether, in fact, the case may appropriately be tried as a class action. *See J.B. ex rel. Hart* v. *Valdez*, 186 F.3d 1280, 1290 n.7 (CA10 1999); *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 691 F.2d 1335, 1342 (CA9 1982); *Blackie* v. *Barrack*, 524 F.2d 891, 901 n.7 (CA9 1975).

B. In Conflict with Other Circuits, the Court of Appeals Relied Only on Respondents' Allegations in Affirming Class Certification.

The Eleventh Circuit in this case joined a sizable minority of courts of appeals that apply a standard for reviewing class certification decisions that is so lenient it practically renders the Rule 23 requirements a nullity. The court relied on respondents' mere allegations, even when the court purported to assess the demanding requirements of predominance and superiority. The court reasoned that "[t]he plaintiffs here *allege* the type of nationwide conspiracy which . . . would probably be appropriate for nationwide class certification," because "all of the defendants operate nationwide and *allegedly* conspired to underpay doctors across the nation, so the numerous factual issues relating to the conspiracy are common to all plaintiffs." App. 57a-58a (emphasis added). By resting on respondents' bare allegations, rather than considering proffered evidence that respondents' claims cannot be proved on a classwide basis, the Eleventh Circuit failed to heed this Court's admonition that courts must undertake a "rigorous analysis" of actual compliance with Rule 23's requirements for class certification. *Falcon*, 457 U.S., at 161.

The court of appeals noted that unlike *Simon*, in which the claimants "fail[ed] to *prove* any standardized representations by [the defendant]," App. 62a (emphasis and alteration

added) (quoting *Simon*, 482 F.2d, at 883), the claimants in this case "*allege* that while the defendants engaged in a variety of specific communications with physicians, they all conveyed essentially the same message—that the defendants would honestly pay physicians the amounts to which they were entitled." *Id.* (emphasis added). But the court's own distinction only highlights the fact that it was applying a different standard for class certification that permitted respondents to obtain class certification by artful pleading rather than actual compliance with Rule 23. The court approved class certification without any reference to the evidentiary record, which refuted the allegations of a unitary conspiracy linked by a single, common misrepresentation, and established instead that acknowledged differences in the alleged representations to putative class members and the impossibility of demonstrating reliance on a classwide basis made this case unsuitable for class resolution.

Moreover, the court of appeals glossed over the individual differences affecting claims and defenses with respect to each putative class member by redefining respondents' conspiracy allegations in the broadest and vaguest terms possible. By concluding that respondents' pleadings alleged hundreds of thousands, perhaps millions, of specific communications all conveying "the same message—that the defendants would honestly pay physicians," *id.*, the court simply assumed away the problems with classwide treatment of respondents' claims. It is difficult to imagine any fraud class that could not be certified if the certifying court could legitimately restate the plaintiffs' claims in such generic terms.

In conflict with those circuits that require plaintiffs to demonstrate actual compliance with Rule 23's prerequisites for class certification, the Eleventh Circuit appears to permit a court to grant certification when claimants simply allege that they can prove an important common issue on a classwide basis. That permissive standard effectively gave respondents

a free pass to class certification because it did not require them to demonstrate that they could at trial actually present common and predominant classwide evidence of the necessary elements of a RICO claim or that the communications from the MCCs to the physicians contained "essentially the same message."[12] Nor did respondents demonstrate that even one physician actually relied on alleged misrepresentations, and certainly not in a way that was common to all members of the putative class. Instead, respondents relied on their allegations of circumstantial evidence of reliance as a way of avoiding the named plaintiffs' testimony that they *had not* relied on the alleged misrepresentations that formed the basis of the RICO claims.[13]

In other words, the court of appeals completely disregarded the strong evidentiary record controverting respondents' generalized and baseless allegations of classwide conspiratorial conduct within the managed care industry and classwide reliance that could simply be presumed or proved by circumstantial evidence.

II. THE COURT SHOULD RESOLVE THE CONFLICT ON WHETHER INDIVIDUALIZED RELIANCE IN NON-SECURITIES FRAUD AND MISREPRESENTATION CASES PRECLUDES CERTIFICATION.

The court of appeals affirmed class certification despite acknowledging that each "plaintiff must prove his own reliance" on the petitioners' alleged misrepresentations. App. 63a. In holding that the issue of individual reliance did not preclude class certification, the court of appeals further

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[12] *See, e.g.*, D.E. 634, R. McCaskill Decl.; D.E. 594, N. Freeman Decl.; D.E. 638, S. Erwin Decl.

[13] *See, e.g.*, D.E. 1599, R. Landon Decl., Ex. A at 181; D.E. 638, Tab A at 203-204; D.E. 661, K. Nowicki Decl., Ex. B at 141, 255-256; R. Landon Decl., Ex. G at 218; *see also* R. Landon Decl., Ex. E at 83; R. Landon Decl., Ex. F at 327.

deepened a conflict among the circuit courts and state supreme courts that have considered whether a class may properly be certified in a nonsecurities fraud or misrepresentation case in which individual reliance is an issue. Moreover, the court of appeals's holding on reliance exemplifies the problems that arise when courts cede their gatekeeper roles and allow plaintiffs' allegations to control their Rule 23 inquiry. The court's failure to conduct the rigorous analysis discussed in Part I produces an easy path for putative class representatives to vitiate the predominance requirement of Rule 23(b)(3).

A. The Eleventh Circuit's Decision Has Deepened the Split Among the Circuits on Whether Class Certification Is Ever Possible When Individual Reliance Is at Issue.

The court of appeals's holding expressly conflicts with holdings of the Fifth Circuit recognizing that class certification can never be proper when individual reliance is in dispute, and also conflicts with similar holdings of the Second, Fourth, Sixth, and Eighth Circuits. The Eleventh Circuit's opinion acknowledged the split with the Fifth Circuit's *Castano* decision. App. 62a. *Castano* reviewed a district court's certification of a class pursuing claims of common-law fraud against a cigarette manufacturer. The Fifth Circuit reversed class certification, reasoning that according to "both the advisory committee's notes to Rule 23(b) and this court's decision in *Simon* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 482 F.2d 880 (5th Cir. 1973), a fraud class action cannot be certified when individual reliance will be an issue." *Castano*, 84 F.3d, at 745.

In a case with strong parallels to the present case, the Fifth Circuit reiterated that, absent presumed reliance,[14] fraud

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[14] Class treatment of reliance issues may be appropriate in securities cases allowing a presumption of reliance. In *Basic, Inc.* v. *Levinson*, 485

actions are unsuitable for class treatment. In *Sandwich Chef of Tex., Inc.* v. *Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205 (CA5 2001), the Fifth Circuit reversed class certification of RICO claims because "[f]raud actions that require proof of individual reliance cannot be certified as FED. R. CIV. P. 23(b)(3) class actions because individual, rather than common, issues will predominate." *Id.*, at 211. The court also explained that "[t]he pervasive issues of individual reliance that generally exist in RICO fraud actions create a working presumption against class certification." *Id.*, at 219.

The Fifth Circuit has clearly and consistently restated this principle in both RICO and non-RICO contexts. *See, e.g.*, *McManus* v. *Fleetwood Enters.*, 320 F.3d 545, 549-50 (CA5 2003) (reversing class certification because "[r]eliance issues are fatal to a Rule 23(b)(3) class for claims of fraudulent concealment and negligent misrepresentation"); *Patterson* v. *Mobil Oil Corp.*, 241 F.3d 417, 419 (CA5 2001) (vacating class certification because RICO fraud actions require proof of individual reliance, a fact that precludes certification under Rule 23(b)(2) and (b)(3)); *Bolin* v. *Sears, Roebuck & Co.*, 231 F.3d 970, 978 (CA5 2000) (holding that "individual findings of reliance necessary to establish RICO liability and damages preclude not only (b)(2) certification of this class under RICO, but (b)(3) certification as well").

In *Moore* v. *PaineWebber, Inc.*, 306 F.3d 1247 (CA2 2002), the Second Circuit held that "a common course of conduct is not enough to show predominance, because a common course of conduct is not sufficient to establish liability of the defendant to any particular plaintiff." *Id.*, at 1255. "In order to establish [the defendant's] liability, each plaintiff must prove that he or she personally received a material misrepresen-

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U.S. 224 (1988), the Court held that reliance may be presumed under a fraud-on-the-market theory for Rule 10b-5 claims. *Id.*, at 242. The fraud-on-the-market theory has not, however, been extended to other contexts.

tation, and that his or her reliance on this misrepresentation was the proximate cause of his or her loss." *Id.* The court of appeals affirmed denial of class certification, holding that, in light of Rule 23(b)(3)'s predominance requirement, fraud claims based on individualized representations are not appropriate subjects for class certification. *Id.*, at 1253.

The Fourth Circuit has likewise held that—absent presumed reliance—fraud and negligent-misrepresentation claims require individualized inquiries into each plaintiff's reliance, "render[ing] class certification improper." *Gunnells* v. *Healthplan Servs., Inc.*, 348 F.3d 417, 434-38 (CA4 2003); *see also Gariety* v. *Grant Thornton, LLP*, 368 F.3d 356, 362 (CA4 2004) ("Because proof of reliance is generally individualized to each plaintiff allegedly defrauded, fraud and negligent misrepresentation claims are not readily susceptible to class action treatment, precluding certification of such actions as a class action." (citation omitted)); *Broussard* v. *Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 342 (CA4 1998) (reversing class certification because class treatment is "impossible" for "claims like common law fraud and negligent misrepresentation," in which reliance must be applied with factual precision).

Additionally, the Sixth and Eighth Circuits and several state supreme courts have also held that, absent presumed reliance, class certification is not proper in cases of fraud, misrepresentation, or estoppel, because necessary inquiries into individual reliance will preclude the class from satisfying the predominance, commonality, or typicality requirements of Rule 23. *See, e.g.*, *Stout* v. *J.D. Byrider*, 228 F.3d 709, 718 (CA6 2000); *Sprague* v. *Gen. Motors Corp.*, 133 F.3d 388, 398 (CA6 1998); *Jensen* v. *SIPCO, Inc.*, 38 F.3d 945, 953 (CA8 1994); *Gaffin* v. *Teledyne, Inc.*, 611 A.2d 467, 474 (Del. 1992); *Banks* v. *N.Y. Life Ins. Co.*, 737 So.2d 1275, 1281 (La. 1999); *Vos* v. *Farm Bureau Life Ins. Co.*, 667 N.W.2d 36, 50 (Iowa 2003).

In contrast, the Third, Seventh, Ninth, and, now, Eleventh Circuits have decided that the necessity of proving individualized reliance does not preclude class certification in cases of fraud or misrepresentation. *See, e.g.*, *Poulos* v. *Caesars World, Inc.*, 379 F.3d 654, 668 (CA9 2004) (affirming denial of class certification, considering whether reliance on a classwide basis could be proved by circumstantial evidence, but concluding that the case did not present facts allowing parties to prove reliance with circumstantial evidence); *Carnegie* v. *Household Int'l, Inc.*, 376 F.3d 656, 663 (CA7 2004) (recognizing conflict and expressing disagreement with *Sandwich Chef*);[15] *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 315 (CA3 1998) (affirming class certification, explaining that "the presence of individual [reliance] questions does not *per se* rule out a finding of predominance").

The Eleventh Circuit initially recognized that reliance may not be presumed in fraud-based RICO actions because "the evidence must demonstrate that each individual plaintiff actually relied upon the misrepresentations at issue." App. 61a. Nevertheless, the court of appeals held that, "based on the nature of the misrepresentations at issue, the circumstantial evidence that can be used to show reliance is common to the whole class." App. 63a. The court explained,

> "The alleged misrepresentations in the instant case are simply that the defendants repeatedly claimed they would reimburse the plaintiffs for medically necessary services they provide to the defendants' insureds, and sent the plaintiffs various EOB forms claiming that they had actually paid the plaintiffs the proper amounts." *Id.*, at 63a-64a.

The court of appeals concluded that "a jury could quite reasonably infer that guarantees concerning physician pay . . .

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[15] A petition for writ of certiorari raising this issue was filed in *Carnegie* on October 14, 2004.

go to the heart of these agreements, and that doctors based their assent upon them." *Id.*, at 64a. Therefore, reasoned the court, "while each plaintiff must prove reliance, he or she may do so through common evidence (that is, through legitimate inferences based in the nature of the alleged misrepresentations at issue)." *Id.*

In discussing the allegations of a common national conspiracy, the court erroneously relied on *Kirkpatrick* v. *J.C. Bradford & Co.*, 827 F.2d 718, 725 (CA11 1987), a case in which the court used the fraud-on-the-market theory to certify securities claims under Rule 10b-5. Even if that theory could be applied in the nonsecurities RICO context, which has never been true, the court could only reach that conclusion by accepting as true respondents' generalized allegations that they intended to prove reliance by circumstantial evidence and by disregarding the substantial record evidence containing the named plaintiffs' testimonial admissions that they did not, in fact, rely on the alleged misrepresentations set out in their complaint. *See* note 13, *supra*. By disregarding the evidentiary record undermining respondents' mere allegation that they intend to prove reliance by circumstantial evidence, the proposed class process threatens to abridge the MCCs' substantive right to insist that respondents establish each element of their claims. *See, e.g.*, *Amchem*, 521 U.S., at 613.

B. This Case Demonstrates Why Class Certification Is Never Proper in a Nonsecurities Fraud Case Involving Individual Issues of Reliance.

This case amply demonstrates why class certification should never be proper in nonsecurities fraud cases involving individual issues of reliance. Unless a court abdicates its Rule 23 role and relies solely on plaintiffs' untested allegations, as the Eleventh Circuit did, it is virtually impossible for plaintiffs to meet the predominance requirement of Rule 23(b)(3). As five other circuits have recognized, individual

issues will inevitably predominate in fraud cases in which reliance is in dispute. *See supra* Part II.A. Moreover, certifying these types of fraud cases as class actions threatens to deprive defendants of the right to demand proof on every element of the claims asserted against them given the Herculean task of challenging individual issues of reliance in a case tried *en masse*.[16]

The court of appeals's refusal to recognize that individual issues always predominate in a fraud case in which reliance is disputed is a product of its failure to look beyond the plaintiffs' allegations and apply the rigorous analysis that Rule 23 requires. The claimants alleged that the managed care petitioners communicated "essentially the same message"—that "they would reimburse the plaintiffs for medically necessary services they provide to the defendants' insureds." App. 62a-64a. But if the court of appeals had actually conducted a rigorous analysis, rather than merely accepting respondents' allegations as true, it would have understood that the MCCs did not communicate uniform messages and that it was impossible to even attempt to show reliance on a classwide basis.

By accepting respondents' generalized allegations as true, and disregarding the record evidence to the contrary, the court concluded that the "nature of the alleged misrepresentations" was "essentially the same," App. 64a, and that, given the allegedly standardized representations, a jury could infer reliance through common evidence. Without a rigorous analysis to evaluate whether those allegations could realistically be tried on a classwide basis, there is effectively no barrier to certifying a class in which reliance is a required

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[16] As the Court has recognized on more than one occasion, "no reading of . . . Rule [23] can ignore the [Rules Enabling] Act's mandate that rules of procedure shall not abridge, enlarge or modify any substantive right." *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 845 (1999) (citing *Amchem*, 521 U.S., at 613) (internal quotation marks omitted); *see* 28 U.S.C. §2072(b).

element, contrary to the holdings of most circuits and state supreme courts. Once the court of appeals accepted as true respondents' generalized allegations that reliance could generally be proved by circumstantial evidence, the court parted ways with the well-reasoned opinions of several other circuits, making predominance a trivial requirement rather than the "demanding" one that the Court has prescribed. *Amchem*, 521 U.S., at 624. If the court of appeals had conducted a rigorous inquiry into whether respondents had satisfied the predominance requirement, it is unthinkable that class certification would have been granted.

III. THE ELEVENTH CIRCUIT'S STANDARD INVITES FRIVOLOUS CLASS ACTIONS AND CREATES EXTRAORDINARY SETTLEMENT PRESSURE IN CASES THAT SHOULD NOT BE CERTIFIED.

The loose standard for reviewing class certification applied by the Eleventh Circuit imposes heavy burdens on the courts and produces high social costs by inviting frivolous and weak class-action suits. *See* Bone & Evans, *supra* note 7, at 1254. A lax certification standard wastes the time and resources of litigants because cases that are improperly certified may have to be later decertified or may devolve into a series of minitrials that waste valuable court time.

Loose class-certification standards also invite claimants with weak claims to use Rule 23 to pressure defendants to settle rather than face "potentially crippling, even bankrupting," damages awards. *Id.*; *see also Newton*, 259 F.3d, at 168 (noting that "granting certification may generate unwarranted pressure to settle nonmeritorious or marginal claims"); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299 (CA7 1995) (expressing the concern of "forcing these defendants to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability"). Lax certification standards also

create incentives for claimants to play a "'shell game,' shopping for theories that are especially conducive to class certification but weak on the facts, expecting at the summary judgment or trial stage to switch to stronger theories that never could meet certification requirements." Bone & Evans, *supra* note 7, at 1255.

CONCLUSION

The court of appeals's decision in this case raises two important and related issues under Rule 23 on which the courts of appeals are sharply divided. The Court should grant the petition for a writ of certiorari and resolve those disagreements among the courts of appeals by reversing the class certification in this case.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

[Filed Sep. 26 2002]

MDL No. 1334
Master File No. 00-1334-MD-MORENO
In Re: Managed Care Litigation

This Document Relates to All Tracks

ORDER GRANTING PROVIDER TRACK CLASS CERTIFICATION AND DENYING SUBSCRIBER TRACK CLASS CERTIFICATION

Introduction

Patients ("Subscribers") and physicians ("Providers") have brought lawsuits against health maintenance organizations ("HMOs") alleging violations of the Racketerring [*sic*] Influenced and Corrupt Organizations Act ("RICO") and the Employee Retirement Income Security Act ("ERISA"). Pending before the Court are the Motions for Class Certification filed by both Provider and Subscriber Plaintiffs. Having considered the motions, submissions and applicable law, together with the evidence obtained after "class action discovery" and arguments of counsel presented at two class certification hearings, the Court DENIES Subscriber Plaintiffs' Motions for Class Certification and GRANTS Provider Plaintiffs' Motion for Class Certification.

Background

Subscriber Track

The Class and Subclass seeking certification include approximately 145 million individuals across the United

States, who were allegedly defrauded by misrepresentations and material omissions of Defendants Cigna,[1] Aetna,[2] Humana, Foundation Health Systems, United Healthcare[3] and Prudential.

The following proposed classes are set forth in each of the Plaintiffs' proposed class certification motions:

> **RICO Class:** All persons in the United States (not including persons insured by Medicare or Medicaid) who purchased or participated in health maintenance organizations, preferred provider organizations, and/or point of service plans, operated by [the respective insurance company] at any time during the period from October 4, 1995 through and the date hereof until [the company's] continuing illegal and wrongful conduct has ceased.
>
> **The ERISA Class:** All persons in the United States who participated in ERISA-governed health maintenance organizations, preferred provider organizations, and/or point of service plans operated by [the respective insurance company] at any time during the period from October 4, 1993 through and after the date hereof until [the company's] continuing illegal and wrongful conduct has ceased.

Provider Track

Approximately 600,000 doctors across the United States comprise the Class and Subclass of the Provider Track. They claim they were allegedly defrauded by misrepresentations and material omissions of Defendants Aetna, CIGNA, Hu-

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[1] Cigna Corporation, Connecticut General Life Insurance Company, and Cigna Health Corporation are collectively referred to as "Cigna."

[2] Aetna, Inc. and Aetna U.S. Healthcare, Inc. are collectively referred to as "Aetna."

[3] United Healthcare, United Health Group, and United Healthcare Corporation are collectively referred to as "United."

mana, Foundation Health, Pacificare Health, Prudential, United and Wellpoint.

The following proposed classes are set forth in Plaintiffs' Amended Motion for Class Certification:

> **The Global Class:** All medical doctors who provided services to any person insured by any Defendant from August 4, 1990 to September 30, 2002.
>
> **National Subclass:** Medical doctors who provided services to any person insured by a Defendant, when the doctor has a claim against such Defendant and is not bound to arbitrate the claim.
>
> **California Subclass:** Medical doctors who provided services to any person insured in California by any Defendant when the doctor was not bound to arbitrate the claim being asserted.

The Global Class is seeking certification for its claims of conspiracy to violate RICO, and for aiding and abetting violations of RICO. The National Subclass is seeking certification for its claims of breach of contract, quantum meruit, RICO violations, unjust enrichment and state prompt pay claims. Finally, the California Subclass seeks certification for its claims under the California Business and Professions Code § 17200.

Legal Analysis

Class Certification Standard

Rule 23 of the Federal Rules of Civil Procedure sets forth the requirements that a moving party must satisfy before a court may certify a class. The Supreme Court has made it clear the prerequisites of Rule 23(a) to class certification cannot be presumed. Rather, a court may certify a class action only if it determines "after a rigorous analysis" that the plaintiff has satisfied all of the requirements of Rule 23(a). *General Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982). The

requirements are commonly referred to as the prerequisites of numerosity, commonality, typicality and adequacy of the representatives.

In addition to the Rule 23(a) requirements, a Court must find that the class satisfies as least one of the requirements of Rule 23(b). Rule 23(b) provides three possibilities for certification, however Plaintiffs here are only proceeding under the latter two options, 23(b)(2) and 23(b)(3).

1. Fed. R. Civ. P. 23(a)

Rule 23(a) requires a plaintiff to establish:

1. **Numerosity.** The class is so numerous that joinder of all members is impracticable.
2. **Commonality.** There are questions of law or fact common to the class.
3. **Typicality.** The claims of the representative parties are typical of the claims or defenses of the class.
4. **Adequacy.** The representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a); *Amchem Prod. Inc. v. Windsor*, 521 U.S. 591, 613 (1997). In order for a class to be certified, all four prerequisites must be met.

a. Numerosity

"Numerosity" under Rule 23(a) is satisfied where joinder of all members of the class is impracticable. *Walco Investments, Inc. v. Thenen*, 168 F.R.D. 315, 324 (S.D. Fla. 1996). The standard for impracticability does not require impossibility, but only that "joinder would be extremely difficult or inconvenient." *CV Reit, Inc. v. Levy*, 144 F.R.D. 690, 696 (S.D. Fla. 1992).

The Eleventh Circuit has held that " while there is no fixed numerosity rule 'generally less than twenty-one is inadequate,

more than forty adequate,' with numbers between varying according to other factors." *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986).

b. Commonality

The next inquiry under rule 23(a) is whether "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Rule 23(a) "does not require that all questions raised by the litigation be common." *Cox*, 784 F.2d at 1557. Rather, as Rule 23(a) explicitly states, a court need only find a *single* common issue of law or fact to satisfy the commonality requirement. *Kreuzfeld A.G. v. Carenhammar*, 138 F.R.D. 594, 599 (S.D. Fla. 1991).

c. Typicality

The third inquiry of Rule 23(a) looks to the "typicality" of the named Plaintiff's claims. The typicality requirement "primarily directs the district court to focus on whether named representatives' claims have the same essential characteristics as the claims of the class at large." *Appleyard v. Wallace*, 754 F.2d 955, 958 (11th Cir. 1985). Thus, if "the same unlawful conduct was directed at or affected both the class representatives and the class itself, the typicality requirement is usually met irrespective of varying fact patterns which underlie the individual claims." *Davis* v. *Southern Bell Tel. & Tel. Co.*, 1993 U.S. Dis. LEXIS 20033, *12 (S.D. Fla. Dec. 23, 1993).

"To meet the typicality requirement, the named representatives must be able to establish the bulk of the elements of each class member's claims when they prove their own claims. . . . If proof of the representatives' claims would not necessarily prove all the proposed class members' claims, the representatives' claims are not typical of the proposed members' claims." *Brooks v. Southern Bell Tel. & Tel. Co.*, 133 F.R.D. 54, 58 (S.D. Fla. 1990). However, any atypicality or conflict between the named Plaintiffs' claims and those of the

Class "must be clear and must be such that the interests of the class are placed in significant jeopardy." *Walco,* 168 F.R.D. at 326 (citing *Sley v. Jamaica Water & Utilities, Inc.,* 77 F.R.D. 391, 394-95 (E.D. Pa. 1977).

Rule 23(a)(3) requires that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." A nexus must be found between the class representative's claims or defenses and the common questions of fact or law which unify the class. *Kornberg v. Carnival Cruise Lines, Inc.,* 741 F.2d 1332 (11th Cir. 1984). This nexus is established if the claims or defenses arise from the same scheme or pattern and are based on the same legal theory. *Id.* at 1337.

d. Adequacy

A two-part test is used to determine adequacy under Rule 23(a)(4). Consideration is given to: (i) whether plaintiffs' counsel are qualified, experienced, and generally able to conduct the proposed litigation; and (ii) whether the named plaintiff has interests antagonistic to those of the rest of the class. *Griffin v. Carlin,* 755 F.2d 1516, 1533 (11th Cir. 1985).

2. Fed. R Civ. P. 23(b)

Even if the court finds, after rigorous scrutiny, that the prerequisites of Rule 23(a) have been met, the certifying party still must establish that class certification is appropriate under Rule 23(b). Rule 23 (b) provides three possibilities for certification, however Plaintiffs here are only proceeding under the latter two options.

a. Rule 23(b)(2)[4]

A class warrants certification under Rule 23(b)(2) when:

> [T]he party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby

[4] Unlike Rule 23(b)(3), this Rule carries no notice obligations or opt-out rights.

> making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Fed. R. Civ. P. 23(b)(2).

Rule 23(b)(2) actions encompass claims for equitable relief, usually injunctive or declaratory. In essence, the class members will allege that the defendant or defendants have either done something unlawful or refused to fulfill a legal obligation, and that injunctive relief would be appropriate with respect to the class as a whole. *Campos v. Immigration & Naturalization Service,* 188 F.R.D. 656, 661 (S.D. Fla. 1999). These cases recognize injunctive relief has a direct, practical effect on all potential class members and to deny class treatment in these situations might result in unfairness to the plaintiffs or the defendants. *See, e.g., Clay v. American Tobacco Co.*, 188 F.R.D. 483 (S.D. Ill. 1999); *Day v. NLO*, 851 F. Supp. 869 (S.D. Ohio 1994).

b. Rule 23(b)(3)

Rule 23(b)(3) requires that common issues of law and fact predominate over individual issues. Fed. R. Civ. P. 23(b)(3). Rule 23(b)(3) includes a non-exhaustive list of factors for the court to consider in making its predominance and superiority determination:

A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

C) the desirability or undesirability of concentrating the litigation of claims in the particular forum; and

D) the difficulties likely to be encountered in the management of a class action.

Fed. R. Civ. P. 23(b)(3)(A)-(D). In making this determination, the district court must consider variations in state law and problems of manageability. *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 740 (5th Cir. 1996); *Andrews v. American Tel. & Tel. Co.*, 95 F.3d 1014, 1024 (11th Cir. 1996). Under Rule 23(b)(3), the plaintiff bears the burden of establishing that damages could be measured on a class-wide basis.

Subscriber Track

A. Rule 23(a)

1. Numerosity

There is no real dispute that the RICO Class and ERISA Subclass meet the standard for numerosity.[5] Members of the RICO Class are those persons who purchased or received coverage, while members of the ERISA Subclass consist of those persons who received coverage through an employee welfare plan. The proposed classes, based on information found in Defendants' 10-K/405 forms, will likely have millions of members each.

Given the size and geographical dispersion of the members of the RICO Class and ERISA Subclass, there is no doubt the potential Class members are so numerous as to make joinder impracticable. Thus, the first requirement of Rule 23(a) is satisfied.

2. Commonality

Defendants Aetna and Foundation argue that commonality does not exist. Aetna submits that the Plaintiffs cannot establish the existence of a uniform, nationwide "safety net,"

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[5] In fact, only Defendant United Healthcare disputes whether Plaintiffs have met the numerosity requirement of Rule 23(a). United argues that only those Plaintiffs who have exhausted their administrative remedies are able to bring these claims forward and no Named Plaintiff has alleged he exhausted his administrative remedies.

for there is no uniform nationwide definition of "medical necessity," as it is a concept defined by numerous state laws and thousands of different self-funded and insured plans.

However, this argument fails at the "commonality" stage. To satisfy the commonality element, there need not be a uniform, nationwide scheme or definition, but merely *some* common facts or issues of law. *See Kreuzfeld A. G.*, 138 F.R.D. at 599. Plaintiffs have met that minimal burden here. Namely, Plaintiffs have demonstrated:

common questions of fact and law which concern both RICO and ERISA:

- Whether the Defendant knowingly misrepresented that claims for coverage of medical services specified in the health plan policies would be paid and services provided if the services met the company's medical necessity definition;
- Whether the Defendant based coverage determinations on undisclosed cost-based criteria that are different from or more restrictive than the factors included in the medical necessity definition;
- Whether the Defendant concealed from class members its use of capitation arrangements with physicians, and the nature and purpose of those arrangements;
- Whether the value of the Defendant's policies as represented was more than the value of the policies as implemented.

common questions of law and fact common to the RICO class:

- Whether the Defendant conducted the affairs of an enterprise through a pattern of racketeering activity;
- Whether the Defendant engaged in an open-ended pattern of racketeering activity involving multiple acts of mail fraud, wire fraud, extortion and Travel Act violations.

common questions of law and fact common to the ERISA class:

- Whether the Defendant's misrepresentations respecting the medical necessity definition also violated its fiduciary duty to refrain from misrepresentations in communication with ERISA class members;
- Whether "gag clauses" found in the Defendant's contracts with providers constitute improper interference with physician-patient communication in violation of the Defendant's fiduciary duties.

3. Typicality

Plaintiffs claim the standard for typicality is met here because the class representative's claims arise from the same operative facts as those of the RICO Class and ERISA Subclass they seek to represent. The named Plaintiffs were victims of uniform misrepresentations and omissions by Defendants as were all Class and Subclass members, and they were injured in the same way as all Class and Subclass members. The named Plaintiffs do not assert any unique legal claims or theories.

Defendants, however, attempt to demonstrate that Plaintiffs' position has no factual foundation. They claim disclosures made directly to members about the challenged practices have been numerous and varied; the disclosures to employers equally so; and the information available in the public domain has been voluminous. In such circumstances, they claim, there can be no "typical" plaintiff. *See, e.g., Sprague v. General Motors Corp.*, 133 F.3d 388, 398-99 (6th Cir. 1998) (finding no typicality where representations about health care benefits varied among putative class members and "[e]ach claim. . . depended on each individual's particular interactions" with employer, which "varied from person to person"); *Kent v. SunAmerica Life Ins. Co.*, 190 F.R.D. 271, 275-76 (D. Mass. 2000) (holding no typicality where means

of obtaining information and content of information varied among class members).

The Plaintiffs focus on the Defendants' treatment of the class members, arguing that the legal claims are identical and that the Defendants have each implemented a common scheme. *See* Moore's Federal Practice § 23.24[8][d] ("In actions under the Racketeer Influenced and Corrupt Organizations Act (RICO), the typicality requirement is satisfied if the claims of the class representative and the class arise from the same scheme by the defendant to defraud the class members."). The Plaintiffs respond to the factual differences between the class representatives' claims and those of some class members by noting that factual differences do not defeat typicality where the claims arise out of the same legal theory. *See, e.g., In re Central States Bakery Antitrust Litigation,* 86 F.R.D. 407, 415 (M.D. La. 1980); *Walco,* 168 F.R.D. at 326 (holding "minor factual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members, and if it is based on the same legal theory.").

Additionally, courts have found similar ERISA claims satisfy the typicality requirement of Rule 23(a). For example, in *Alday v. Container Corp. of America,* 1998 WL 236038 (M.D. Fla. 1998), the court considered whether plaintiffs' claims that defendants had breached their fiduciary duties under ERISA were sufficient to fulfill the typicality requirement of Rule 23(a). Looking at both commonality and typicality, the court held that "the Plaintiffs' claims that Defendants' action was in violation of ERISA and breached their fiduciary duties are claims which are typical of all potential class members." *Id.* at *8. Indeed, in certifying an ERISA class, the *Alday* court noted, "[t]he injury flowing from Defendants' act is the same as to all potential class members and their claims for relief are similar." *Id.* The same

is true for the ERISA Subclass here, as the Plaintiffs' claims for relief are similar.

Because Plaintiffs have properly plead typicality, and Defendants have not shown the differences or "conflict" among the Plaintiffs would place the interests of the class in significant jeopardy, the Court finds that the named Plaintiffs have met their burden of establishing that their claims are typical of the claims of the class.

4. Adequacy

a. Counsel

The Defendants argued Plaintiffs' counsel, specifically the firm of Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A., is inadequate because it represents the conflicting interests of the Provider Plaintiffs and Subscriber Plaintiffs.

In this action, this court has already determined the proposed class counsel are knowledgeable and posses extensive experience in complex class action litigation including federal RICO and ERISA claims. Plaintiffs' counsel are committed to the vigorous prosecution of this action and possess both the skills and competence necessary for such efforts. Additionally, each named Plaintiff has filed a Consent regarding the representation. This Court has already visited this issue and Defendants have not presented any evidence to contradict its determination that Plaintiffs counsel are adequate.

b. Named Representatives

Several of the Defendants argue that the named Plaintiffs are inadequate representatives because they lack sufficient knowledge of the facts alleged in the Complaints and major developments in their case. Specifically, Defendants note several of the named Plaintiffs have testified that they have no knowledge of the names of the judges presiding over their

case or of the majority of lawyers prosecuting the case on their behalf, deadlines in the case, and the fact that the case had been moved to Florida, until shortly before their depositions.

The Court notes that such a lack of knowledge by some of the named Plaintiffs is understandable given the complexity and size of this case. Thus, the Court finds that such a common and expected lack of knowledge by some of the named Plaintiffs does not render them inadequate representatives. *Lewis v. Curtis,* 671 F.2d 779, 789 (3d Cir. 1982) (finding class representatives not required to have detailed knowledge of the litigation). Additionally, where the class, as it is here, is "represented by competent and zealous counsel, class certification should not be denied simply because of a perceived lack of subjective interest on the part of the named plaintiffs unless their participation is so minimal that they virtually have abdicated to their attorneys the conduct of the case." *Krikpatrick v. J. C. Bradford &* Co., 827 F.2d 718, 728 (11th Cir. 1987). Based on the evidence before it, the Court cannot find that Plaintiffs have virtually abdicated to their attorneys the conduct of the case.

B. Rule 23(b)(2)

Under Rule 23(b)(2), this Court must determine whether the Defendants have acted on grounds "generally applicable to the class as a whole," and if so, whether injunctive relief is the appropriate and primary remedy for the ERISA claims.

1. "Generally Applicable"

The term "generally applicable" has been interpreted to mean that the party opposing the class "has acted in a consistent manner towards members of the class so that his actions may be viewed as part of a pattern of activity, or to establish a regulatory scheme, to all members." *Leszczynski v. Allianz Ins.,* 176 F.R.D. 659, 673 (S.D. Fla. 1997).

The Advisory Committee Notes illustrate that Rule 23(b)(2) applies only where class treatment is "clearly called for," for example, in situations where a court, through a single injunction or declaration, can redress "group, as opposed to individual, injuries. . . " *Holmes v. Cont'l Can Co.,* 706 F.2d 1144, 1155 (11th Cir. 1983). A Rule 23(b)(2) action cannot resolve individualized issues of fact, nor provide different types of relief required to redress individual injuries. 5 James Wm. Moore, et al., *Moore's Fed. Prac.* § 23.43(2)(b) at 23-195 (3d ed. 2000).

The majority of courts involving Rule 23(b)(2) certification found defendants engaged in uniform conduct as to all members of the proposed class. *Clay*, 188 F.R.D. at 494 (finding allegations of concerted advertising aimed at minors made clear that the marketing was conducted **uniformly** as to all members of the proposed class); *Leszczynski,* 176 F.R.D. at 673 (finding defendant's **uniform** refusal to pay claims to persons injured while occupants of leased vehicles constitutes the type of pattern or practice envisioned by rule 23(b)(2)); *Davis,* 1993 WL 593999, at *6 (finding that because defendant charged all members the **same**, allegedly monopolistic prices, it injured all class members in the same way); *In re Consolidated "Non-Filing Insurance" Fee Litigation*, 195 F.R.D. 684, 694-95 (M.D. Ala. 2000) (finding defendant acted on grounds generally applicable to the class when it imposed a **uniform** fee on all members of the putative class); *Campos,* 188 F.R.D. at 661 (finding that because all the plaintiffs were denied waivers based on the **same** policies and practices, defendant acted on grounds generally applicable to the entire class); *Bolin*, 231 F.3d at 975 (finding the plaintiff alleged a **uniform** policy of fraud promulgated by a central authority and applied across the board).

The Court agrees that Plaintiffs satisfied the typicality element of Rule 23(a) based on the fact that there were

similar factual issues, and Plaintiffs all proceeded under the same legal theory. However, the Court did not determine that there was a **uniform** policy or scheme. At the 23(b)(2) certification stage, the Court cannot agree that Plaintiffs have satisfied the burden of proving that Defendants acted on grounds "generally applicable to the class as a whole" as the caselaw has interpreted that phrase.

Plaintiffs have alleged that Defendants engaged in a "common scheme" or "pattern or practice" of uniform activity. The "scheme," however, if there is one at all, is not promulgated by centralized authority, or uniform in all respects, but rather controlled on an individual level through subsidiaries and employers, thus differing amongst them. The Defendants have demonstrated the material differences in the documents upon which Plaintiffs rely to support their claim of uniformity. Because this Court can find no uniform scheme, the merits of the Plaintiffs claims turn on the Defendants individualized dealings with each Plaintiff. This renders the ERISA class unsuitable for class treatment under Rule 23(b)(2).

2. Injunctive Relief

Defendants also assert the claim for "predominantly" injunctive relief is absurd because many of the named representatives are not even members of Defendants health care plans. They have no stake in the future price or shape of Defendants' coverage policies. This argument holds true for the remaining claims of the former subscribers only.

The Court need not reach this issue because of lack of evidence that the Defendants engaged in behavior generally applicable to the class as a whole. Even if it did, the Court holds that Subscriber Plaintiffs have met their burden of showing their claim was primarily based on injunctive relief where they have submitted a voluminous record detailing the damages incurred by the Plaintiffs and how those damages

would be calculated. Additionally, the Court is not convinced that one injunction would redress the entire class' injuries.

C. Rule 23(b)(3) RICO Class

The Subscriber Plaintiffs seek certification of the RICO Class, which is predicated on the mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343. A violation of the mail or wire fraud statutes requires proof that a person "(1) intentionally participate[d] in a scheme to defraud another of money or property and (2) use[d] the mails or wires in furtherance of that scheme." *Pelletier v. Zweifel,* 921 F.2d 1465, 1498 (11th Cir. 1991). In the Eleventh Circuit, when a civil RICO claim is predicated upon mail or wire fraud, the plaintiff must additionally show that "he was injured by reason of the defendant's acts of deception." *Id.* at 1499. Thus, when a plaintiff brings a civil RICO action predicated upon mail or wire fraud, he must prove that he was "a target of the scheme to defraud" and that he "relied to his detriment on misrepresentations made in furtherance of that scheme." *Id.* at 1499-1500.

The plaintiff has the burden of proving the following elements of a civil RICO claim predicated upon mail or wire fraud: (1) that the defendant intentionally participated, (2) in a scheme to defraud, (3) the plaintiff of money or property, (4) by means of material misrepresentations, (5) using the mails or wires, (6) and that the plaintiff relied on a misrepresentation made in furtherance of the fraudulent scheme, (7) that such misrepresentation would have been relied upon by a reasonable person, (8) that the plaintiff suffered injury as a result of such reliance, and (9) that the plaintiff incurred a specifiable amount of damages. *Sikes v. Teleline, Inc.,* 281 F.3d 1350 (11th Cir. 2002).

1. Predominance

The Court must find that common issues of law or fact predominate over individual issues. Several of the Defendants

argue that the Rule 23(b)(3) requirement is not met here because individual issues will predominate over issues common to the class. Specifically, Defendants claim that individual questions of reliance predominate as to Plaintiffs' RICO and fraud claims.

The crux of plaintiffs' allegations is that each Defendant made material misrepresentations to the entire class that were uniform in all respects and that Defendants have engaged in a common scheme of misrepresenting to the subscribers the amount of coverage they receive.

Defendants point out that the action is against holding companies, whose locally operated subsidiaries contract with thousands of employers nationwide to provide health care services. The subsidiaries and employers are the entities that make various types of disclosures to participants. Further, the subsidiaries and employers often modify such disclosures over time as a result of state regulations, changes in policy and medical practices, and the specific needs of the subsidiaries. As a result, the disclosures members receive regarding their medical coverage vary both temporally and geographically.

For example, certain Defendants have modified the definition of the terms "medically necessary" and "experimental, investigational or unproven procedures" in certificates throughout the years, and have added disclosures regarding the use of physician incentives. Additionally, because the Defendants do not require their subsidiaries to follow the generic language of their certificates, or adopt the language contained therein, the certificates actually issued by the subsidiaries often vary. The Defendants also provide information to members in various other ways, such as information provided orally to employees at informal meetings, marketing materials, enrollment materials, member materials and other documents. The subsidiaries make their own decisions with respect to advertising and marketing

without the involvement or approval of Defendants, and thus the local subsidiaries vary in the quantity, nature and content of their marketing. Further, the content of these types of materials and whether they actually reach the member or potential member vary based on whether the individual employer allows such materials to be provided to its employees and based on what the state insurance agency has approved for distribution to individuals. Thus, because of these vast differences and variations in plan documents, Plaintiffs' allegation of a common scheme is not supported by the evidence.

Plaintiffs allege that "where a number of plaintiffs claim injury from a single fraudulent scheme allegedly constituting racketeering activity on the part of defendants, each of the plaintiffs' claims will focus on defendants' conduct to establish a violation of section 1962. The issues of law and fact involved in making out a violation of section 1962 will generally be common to all plaintiffs' claims," and will predominate over potential individual issues such as the nature and extent of injuries suffered by plaintiffs and each class member. *McMahon Books, Inc. v. Willow Grove Associates*, 108 F.R.D. 32, 39 (E.D. Pa. 1985).

However, the Advisory Committee Notes under Revised Rule 23 state: "[A]lthough having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they are addressed." *See Simon v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 482 F.2d 880, 882 (5th Cir. 1973).

Because this Court finds there is no proof of a common scheme and the disclosures the putative class members have received regarding their medical benefits are not uniform, and indeed materially vary from year to year and plan to plan, class treatment of Plaintiffs' claims predicated on fraud is inappropriate. Where there are variances in the alleged repre-

sentations supporting claims based on fraud, courts routinely refuse to certify class actions because of the individualized proof involved in order to sustain the claims. *See Andrews*, 95 F.3d at 1024-25 (finding certification of class alleging RICO violations based on fraud was an abuse of discretion because "[t]he 900-number programs at issue. . . differ widely in terms of the advertising and solicitation used, the extent to which disclosures were made, and the existence and promotion of free means of participation, so each program must be assessed individually to determine whether fraudulent tactics were employed by the appellants."); *Spencer v. Central States, Southwest Areas Pension Fund*, 778 F. Supp. 985 (N.D. Ill. 1991) (denying class certification alleging breach of fiduciary duty under ERISA where representations made were not uniformly communicated to each member of the class).

Plaintiffs claim predominance has been found even where the presentations in question have some degree of individualization. However, the cases cited by Plaintiffs do not compel a contrary result. *See, e.g., Dornberger v. Metropolitan Life Ins. Co.*, 182 F.R.D. 72, 79-81 (S.D.N.Y. 1997); *Walco,* 168 F.R.D. at 336; *Duhaime v. John Hancock Mut. Life Ins. Co.*, 177 F.R.D. 54, 64 (D. Mass. 1997).

In *Walco*, this Court found that because there were no substantial material differences in the misrepresentations to the plaintiff class, individual issues did not predominate. *Walco,* 168 F.R.D. at 336. There, the plaintiffs alleged a common scheme of fraud, and the defendants argued that common questions could not predominate because plaintiffs could not demonstrate the existence of a single standardized sales pitch. *Id.* This Court found that although the sales pitches may not have been identical, they were "substantially identical," and that all the sales pitches misrepresented or omitted the same material information. *Id.* In the instant case, the record does not reflect that all plan documents and oral

representations omitted the same material information. On the contrary, the record reflects how the plan documents vary widely and contain great divergences in the information provided. Thus, the Court is unable to accept that the plan documents are "substantially identical" as it was able to do in *Walco*.

In *Dornberger*, the plaintiffs alleged defendants engaged in the illegal sale of life insurance based on a common set of facts and course of consistent conduct. 182 F.R.D. at 79. The court found individual issues did not predominate. *Id.* However, the plaintiffs alleged and proved the existence of uniform, written misrepresentations. *Id.* at 81. The court found this enough to meet the tests of commonality and predominance. *Id.* Here, the Plaintiffs have merely alleged, but not *proven* the existence of uniform, written documents. Thus, the Court is unable to conclude, as the *Dornberger* court did, that individual issues do not predominate.

At issue in *Duhaime* was a district court's certification of a class for settlement purposes. 177 F.R.D. at 57. The claims involved misleading and deceptive sales practices. *Id.* at 58. The court found that common issues predominated even though a large part of the scheme was implemented through oral misrepresentations. *Id.* at 64. However, the court also noted the allegations in the complaint described a nationwide course of conduct with a nationwide training program where differences in oral presentations would not defeat predominance. *Id.* Here, Plaintiffs have not shown a nationwide course of conduct. Not only were there variations in the oral representations, but there was also variations among the written plan documents and no nationwide training program.

In *Peterson v. H & R Block Tax Services, Inc.*, plaintiffs sought certification of a class of taxpayers who were allegedly deceived by misrepresentations from a tax preparer on the availability of its refund anticipation loan service. 174 F.R.D. 78, 80-81 (N.D. Ill. 1997). The defendant attempted to

differentiate the class members' experiences by showing differences among: 1) the specific advertising and marketing promotions the class members might have seen or received; 2) other information to which they might have been exposed through discussions with friends and encounters with defendant's personnel; and 3) the extent to which the class members may have read and understood the disclosure documents. *Id.* at 82. For these reasons, the defendant argued, individual and not common issues predominated. The district court disagreed. *Id.* at 83.

First, the court noted that defendants presented no evidence of any theoretical differences among class members with regard to the advertising and oral representations. Although Defendants asserted this argument, they failed to point to any documentation or evidence to support it. *Id.*

Second, the court stated, "assuming the class members were presented various ads, promotions and oral statements, none of these materials or statements form the basis of the alleged fraud" at issue. *Id.* Rather, the claims in that case were premised on written misrepresentations contained in standard documents furnished to every class member—a situation that the court found presents a "classic case for treatment as a class action." *Id.* (quoting *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 121 F.R.D. 664, 669 (N.D. Ill. 1988)) [*sic*] Consequently, the court determined any oral representations the class members received personally "may have supplemented the written documents that [the class] received, but they do not replace those written statements as the focus of the fraud alleged." *Id.* (quoting *Arenson v. White-hall Convalescent & Nursing Home, Inc.*, 164 F.R.D. 659, 665 (N.D. Ill. 1996)). Courts will find predominance despite the existence of oral representations that vary among class members if those representations are not integral to the alleged fraud. *Id;* [*sic*] *see also Scholes v. Moore*, 150 F.R.D. 133, 13 (N.D. Ill. 1993). In *Peterson*, the allegations were predi-

cated on standard written documents presented by the defendant. Thus, the court could not characterize individualized representations outside those documents as "integral." However, here, this Court can. Additionally, individual reliance is not an element of a RICO claim in the Seventh Circuit as it is in the Eleventh. The court made clear the sole factors in the class members' decisions to purchase the service were the standard documents provided by defendants. Plaintiffs have not proven that to be the case here.

On the other hand, the Defendants' cases are compelling.

In *Peoples v. American Fid. Life Ins. Co.,* the district court refused to certify the class because plaintiffs did not properly allege common issues of fact and law predominated. 176 F.R.D. 673, 646 (N.D. Fla. 1998). There, the court found that although at the heart of plaintiffs case was the assertion that the fraudulent marketing and sales scheme of certain life insurance was monolithic and universal, plaintiffs fail to address differences in the sales pitches heard by each named plaintiff. *Id.* at 644. The plaintiffs attempted to argue that a canned presentation was designed to be delivered word-for-word, and that the salespeople were admonished not to change a word. The court found, however, this was not the case. Instead, defendants showed that changes were made in each presentation. The court stated these differences in the presentations and documents demonstrated a lack of commonality. *Id.* The court found that the many factual differences were determinative and that if each purchase of a policy has to be examined as to the content of the presentation, the questions asked by the purchaser, the parts of the offer which were attractive to the purchaser, and the reliance by the purchaser on both the oral and written presentations, there will have to be a mini-trial involving each of those issues for each of the millions of purchasers plaintiffs purport to represent. *Id.* at 645. The court determined that "it is abundantly

clear from the foregoing analysis that the case contains a factual minefield," just like the instant case. *Id.*

Finally, *Sikes* is controlling. The district court in *Sikes* certified a nationwide class of individuals who claimed to have been defrauded by an automated "900-number" telemarketing program entitled "Let's Make a Deal." *Sikes v. American Telephone & Telegraph Co.*, 179 F.R.D. 342, 345 (S.D. Ga. 1998). Specifically, the plaintiffs claimed the "Let's Make a Deal" program fraudulently induced customers to incur long-distance charges and asserted RICO claims predicated on mail fraud, wire fraud, and illegal gambling against AT&T, the telecommunications carrier for the "Let's Make a Deal" program. *Id.* Although the fraud allegations were similar to claims that the Eleventh Circuit found unsuitable for certification in *Andrews,* the district court determined the facts specific to *Sikes* did not compel the same result as *Andrews. Id.* at 347; *see also Andrews,* 95 F.3d 1014. The district court found *Andrews* not to be controlling because the alleged fraud surrounding the lone "900-number" program at issue in *Sikes* was such that reliance, injury or damages could virtually be presumed. *Sikes*, 179 F.R.D. at 346-47. The court reached this result because it found the plaintiffs basically **alleged** that the defendant committed the same unlawful acts in the same method against the entire class. *Id.* at 347.

The Eleventh Circuit reversed and decertified the class based upon a lack of predominance. *Sikes*, 281 F.3d at 1352. It found plaintiffs always bear the burden of **proving**, rather than merely **alleging**, all factual predicates for class certification. *Id.* at 1362. The Eleventh Circuit rejected the propriety of allowing a presumption that would relieve plaintiffs of their burden of having to prove every element of a claim. *Id.* The Court of Appeals noted that a presumption is generally employed to benefit a party who does not have control of the evidence on an issue. *Id.* On the facts as

presented in *Sikes,* plaintiffs, and not the defendant, were in control of information regarding reliance, the content of the alleged fraudulent advertisements, injury and damages. *Id.*

The Eleventh Circuit clarified that the only cases in which a presumption has been permitted involve the reliance element of "fraud-on-the-market" securities claims, based on the theory that investors necessarily rely on the integrity of the securities market and on the prices set by that efficient market when making securities trades. *Id.* at 1363. The Court made clear that such rules may only be invoked in the securities fraud cases: "the securities market presents a wholly different context than a consumer fraud case, and neither this circuit nor the Supreme Court has extended a presumption of reliance outside the context of securities cases." *Id.* In other cases, including those founded on RICO, the plaintiffs bear the burden of proving that the advertisements upon which each class member relied were fraudulent and misleading. *See id.* at 1363-64.

The Eleventh Circuit noted a district court cannot simply presume that all advertisements or communications were uniformly "misleading, because each individual plaintiff bears the burden of proving the ad upon which he relied was misleading." *Id.* at 1364. Because a factfinder cannot determine whether an advertisement was misleading or fraudulent without knowing its content, each plaintiff will have to provide evidence of the particular advertisement that he heard or saw—an exercise that would necessarily cause individual issues to predominate over common issues. *Id.*

The *Sikes* Court did note, however, in rejecting the use of a presumption of reliance on the facts of the *Sikes* case, that the plaintiff class may still prove reliance by circumstantial evidence. "We do not say herein that reliance must be proved by direct (as opposed to circumstantial) evidence. We merely hold that reliance may not be *presumed* such that a plaintiff

does not have to come forward to prove an element of the claim." *Id.* at 1362, n. 32.

Alternatively, Subscriber Plaintiffs claim that if a presumption of reliance cannot be made, then reliance in a fraud action may be *proven* by circumstantial evidence.[6] Plaintiffs assert they have demonstrated, through circumstantial evidence, that the class members relied on the uniform, written misrepresentations prepared by Defendants.

Subscriber Plaintiffs assert that because they have submitted to the court evidence of uniform, written disclosure documents prepared by each of the defendants, their case is distinguishable from *Sikes*. Subscriber Plaintiffs claim their documents do not vary considerably in terms of content and language, as the advertisements did in *Sikes.* Subscriber Plaintiffs assert this is enough to distinguish their case. However, Subscriber Plaintiffs failed to recognize that the Defendants have presented evidence of numerous, non-uniform, oral representations. In light of these representations, this case appears more similar to *Sikes.*

Subscriber Plaintiffs additionally claim individual reliance issues do not predominate here because the fraud was perpetrated in a uniform manner against every member of the class. They assert cases in which individual issues of reliance predominated involved nonuniform, oral misrepresentations. *See, e.g., Id.; Andrews*, 95 F.3d at 1024-25.

Defendants, on the other hand, assert the RICO analysis undertaken by the Eleventh Circuit in *Sikes,* after the motion for class certification was filed, demonstrates that the law of this circuit completely precludes class certification in the subscriber cases. *Sikes* demonstrates that any attempt to

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[6] Plaintiffs refer to the uniform, written disclosure documents prepared by each of the defendants and the analysis of Professor John Gruber as the circumstantial evidence which proves reliance by the Plaintiffs.

prove the defendants engaged in a "scheme to defraud" will require individualized evidence entirely inconsistent with the class action device. They contend that where 119 television commercials, print advertisements, and direct mail solicitations to 10,000 AT&T subscribers rendered class treatment of the "scheme to defraud" element impossible in Sikes, it follows that class treatment of the "scheme to defraud" element is impossible for the tens of millions of subscribers in this case who received information about thousands of different health coverage options for a multiplicity of sources. Each plaintiff will have to provide evidence of the particular disclosure he heard or saw, and that the disclosure was misleading.

Sikes held presumption of reliance is an inappropriate tool where each individual plaintiff is the only one with information about the content of the information upon which he relied. Here, obviously, Defendants and employers may have information about the content of the information upon which the Plaintiffs relied. But similar to *Sikes*, Defendants have shown that some documents may no longer be in existence, were never in their control, certain statements were made orally and unrecorded, and there is variance among the disclosure documents Defendants have in their control.

Plaintiffs are asking this court to *presume* that the only relevant information to each Plaintiff's health care decision was the written, uniform documents. However, the non-uniform oral representations may have had an impact on each Plaintiff's decision. As in *Sikes*, each individual plaintiff is the only one with **all** of the information upon which he relied in making his health care coverage determination. The oral, non-uniform communications may have been part of what the Plaintiffs relied upon when making their health care coverage decisions. The only way to determine what each plaintiff relied upon is to ask each individual plaintiff—some-

thing which, if done, precludes class certification because individual issues will predominate over the class issues.

The Plaintiffs' claims will require distinctly case-specific inquiries into the facts surrounding each incident of fraud. The issues that must be addressed include not only which representations each individual Plaintiff relied upon, but also what information was available to each Plaintiff, what knowledge about the industry each Plaintiff had, and so on. Even more varied issues would certainly be present in the claims of millions of members of an improperly certified class. Furthermore, even factual issues that are common to many of the Plaintiffs will require highly case-specific determinations at trial. These issues are clearly predominant over the only issue arguably common to the class—whether Defendants have a policy or practice of misrepresentation and concealing certain procedures.

2. Superiority

Even if this Court found Plaintiffs met the predominance requirement of Rule 23(b)(3), Plaintiffs have not shown that class action is a superior method of adjudicating the dispute.

The superiority factor requires the Court to determine whether there is a better method of handling the controversy other than through the class action mechanism. *Singer v. AT&T Corp.*, 185 F.R.D. 681, 692 (S.D. Fla. 1998). The relevant question, therefore, is whether class certification manageability issues create a situation that is less fair and efficient than other available techniques for resolving the claims of all the class members—not whether litigation of these claims should go forward at all. *Sikes*, 179 F.R.D. at 351.

Courts are generally reluctant to deny class certification based on speculative problems with case management. *Buford v. H&R Block, Inc.*, 168 F.R.D. 340, 363 (S.D. Ga. 1996) (finding of unmanagability requires more than the

case will be difficult to try or that the case involves novel legal challenges). Plaintiffs claim there are no difficulties likely to be encountered in the management of 145 million subscribers that cannot be resolved or that outweigh the clear benefits of maintaining this case as a class action. *See In re Disposable Contact Lens Antitrust Litigation,* 170 F.R.D. 524, 529 (M.D. Fla. 1996) (certifying class of contact lens purchasers with 15 million members).

The Defendants propose the Court consider whether certification is appropriate in the "interests of justice," asserting that certification of a class action of this magnitude would result in a single jury determining the fate of a predominant portion of the health insurance industry. *See, e.g., Walco,* 168 F.R.D. at 337 (a court has discretion to consider factors other than those specified in Rule 23(b)(3) when making a superiority determination); *In re Rhone-Poulenc Rorer, Inc.,* 51 F.3d 1293, 1300 (7th Cir. 1995) (holding class treatment is inappropriate where "[o]ne jury . . . will hold the fate of an industry in the palm of its hand.").

It may be true that, at a general level, the issue here is whether the Defendants engaged in a common course of fraudulent conduct denying the Plaintiffs the benefit of their health insurance coverage. But as a practical matter, the resolution of this overarching common issue breaks down into an unmanageable variety of individual legal and factual issues. *See Amchem Products, Inc.,* 83 F.3d at 626 (stating that beyond broad common issues surrounding harmfulness of asbestos exposure, class members' claims against asbestos manufacturers varied widely in character and could not be tried on a class basis). The class' mail and wire fraud allegations, for example, are not wholly subject to class-wide resolution. *See Pelletier*, 921 F.2d at 1499-1500 (stating that each plaintiff must demonstrate reliance on deceptive conduct in furtherance of the alleged RICO scheme).

Litigating the Plaintiffs' claims as a class action comprising 145 million members, no matter what the cost in terms of judicial economy, efficiency and fairness, runs counter to the policies underlying Rule 23(b)(3). *See* Fed. R. Civ. P. 23 advisory committee's note (1966 amendment) (stating that subdivision (b)(3) encompasses those cases "in which a class action would achieve economies of time, effort, and expense"). While this Court recognizes Rule 23 is to be applied flexibly, the manageability problems discussed above defeat the Rule's underlying purposes and render these claims inappropriate for class treatment. Finally, the Court notes that Plaintiffs' assertion that the small size of each member's claims makes class treatment appear to be the only feasible method of adjudication, does not hold true. Even small individual claims under RICO can be feasible given the possibility of the award of treble damages and attorneys' fees to successful plaintiffs. *Andrews,* 95 F.3d at 1025.

C. Rule 23(b)(3) ERISA Subclass

The remaining ERISA claims are the former subscribers' claims for misrepresentation of the "medical necessity" definition and for all subscribers, the "gag clause" claims.

1. Predominance

Individual issues will predominate over common ones in the ERISA Class as well because the Court has determined that there is no common scheme or course of conduct by the Defendants.

Reliance is an issue for the ERISA claims as well. The Defendants direct this Court's attention to *Hudson v. Delta Air Lines, Inc.*, 90 F.3d 451, 457 (11th Cir. 1996). In that case, former Delta employees brought ERISA and contract claim against the airline alleging that they chose their retirement dates in reliance on promises that they would receive the same level of medical coverage throughout their retirement and that no improved retirement package was

planned, when in fact a more favorable package was in the works. The court upheld a denial of class certification of the breach of fiduciary duty claim, concluding that "[e]ven if the plaintiffs are able to prove that Delta disseminated a false and uniform message to all potential retirees that no such plan was in the works at the time they made their decision to retire, they would also have to show that all members of the class would have deferred their retirement" in reliance on Delta's alleged misrepresentations. *Id.* at 457. Thus, individualized issues will predominate over common ones, making class certification inappropriate.

2. Superiority

Even if this Court finds the ERISA Subclass meets the predominance requirement of Rule 23(b)(3), Plaintiffs have not shown that class action is a superior method of adjudicating the dispute.

The superiority factor requires the Court to determine whether there is a better method of handling the controversy other than through the class action mechanism. *Singer,* 185 F.R.D. at 692. The relevant question, therefore, is whether class certification manageability issues create a situation that is less fair and efficient than other available techniques for resolving the claims of all the class members—not whether litigation of these claims should go forward at all. *Sikes*, 179 F.R.D. at 351.

Just as in the RICO Class, while it may be true that at a general level, the issue here is whether the Defendants engaged in a common course of fraudulent conduct denying the Plaintiffs of the benefit of their health insurance coverage, as a practical matter, the resolution of this overarching common issue breaks down into an unmanageable variety of individual legal and factual issues. *See Amchem Products, Inc.*, 83 F.3d at 626 (stating that beyond broad common issues surrounding harmfulness of asbestos exposure, class

members' claims against asbestos manufacturers varied widely in character and could not be tried on a class basis).

Litigating the Plaintiffs' claims as a class action no matter what the cost in terms of judicial economy, efficiency and fairness runs counter to the policies underlying Rule 23(b)(3). *See* Fed R. Civ. P. 23 advisory committee's note (1966 amendment) (stating that subdivision (b)(3) encompasses those cases "in which a class action would achieve economies of time, effort, and expense"). While this Court recognizes Rule 23 is to be applied flexibly, the manageability problems discussed above defeat the Rule's underlying purposes and render these claims inappropriate for class treatment.

Provider Track

A. Rule 23(a)

1. Numerosity

Defendants do not dispute that the Provider Plaintiffs have met this element. The proposed global class here would include all doctors who treated a patient who is a member of a Defendant from 1990 through to the present. The Plaintiffs contend this class will exceed approximately 600,000 members. The two subclasses, although smaller in number, still clearly meet the numerosity requirement.

Once again, given the size and geographical dispersion of the members of the Provider Track classes, the potential class members are so numerous that joinder of them all is impracticable.

2. Commonality

Where, as here, Plaintiffs' detailed allegations and other evidence set forth a common scheme of deceptive conduct, the "commonality" element is satisfied. The evidence of such a uniform, common fraudulent scheme naturally lends itself to class-wide proof. *Walco*, 168 F.R.D. at 335. Here, the Provider Plaintiffs have done more than just allege a common

scheme, they have demonstrated facts which support its existence.

The Plaintiffs' allege Defendants engaged in a pattern of collective behavior which has inflicted and continues to inflict, substantial harm on the Plaintiffs. Plaintiffs claim Defendants have engaged in a conspiracy and have also aided and abetted each other in implementing and continuing a common fraudulent scheme designed to systematically obstruct, reduce, delay and deny payments and reimbursements to health care providers.

Plaintiffs point to deposition testimony confirming that Defendants meet via trade associations, joint health plan provider organizations and a corporation established and financed by managed care entities, specifically to discuss and develop common plans regarding the processing of provider claims.

Additionally, the depositions demonstrate that the Defendants uniformly require physicians to use an HCFA-1500 form in submitting claims. This is the threshold information required for processing a claim. The HCFA-1500 form requires a CPT code procedure code and an ICD 9 diagnosis code. The CPT code indicates to the insurer the services provided by the physician. CPT codes are standard descriptors for the terminology produced by the AMA, and the use of CPT-4 codes for claims processing is a common, industry-wide practice. This uniform coding practices is what allows for automated logic to be applied across the board to physicians. The data contained on an HCFA-1500 form are simply code numbers that do not contain anything that would allow a benefit analyst or claims processor to make a distinction between the different codes. Thus, this "medical review" based on the HCFA-1500 form is illusory.

Defendants have implemented systematic claims processes whereby Defendants have the ability to manipulate CPT

codes, downcode and bundle claims, delay and wrongfully deny payments. Most Defendants use software sold and licensed by McKesson HBOC[7] or comparable software which is capable of modifying CPT codes and, accordingly, reimbursement rates. Plaintiffs have demonstrated Defendants' extensive use of these programs.

The Provider Plaintiffs are unlike the Subscriber Plaintiffs in that they have established a common scheme or course of conduct on behalf of the Defendants. The Subscriber Plaintiffs were unable to overcome the Defendants evidence of the material variations in the plan documents and oral representations made to Subscribers. These differences make it impossible for this court to conclude that there was a common scheme.

However, the Provider Track is different. All Defendants utilize computer software programs to process claims. Although there may be variations among the software used, Defendants have not demonstrated that these variations were material. The Provider Track also differs because individual subsidiaries and employers do not control the claims process, and the Providers are not given various representations upon which they rely, instead, they claim the entire *process* is fraudulent.

Additionally, even if they had not proven the existence of a common scheme, the Providers, just like the Subscribers, are all proceeding under common issues of law and fact:

Common issues of fact as proposed by the Plaintiffs include allegations concerning the Defendants'

- common automated bundling practices
- common automated downcoding practices

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[7] CodeReview, ClaimCheck, and Patterns Review are auditing and compliance software systems sold and licensed by McKesson HBOC.

- common systematic practice of making medical necessity determinations based on non-medical criteria
- automated systems to identify physicians as "outliers"
- the payment of bonuses or other incentives to claims employees
- the failure to pay claims within the applicable contract and statutory time periods, and
- the common failure to place patients on physicians' capitation rolls until treatment is sought, depriving a physician of a portion of capitation payment.

Common questions of law, as proposed by the Plaintiffs, include:

- whether making payments on a basis other than the medical necessity definition contained in the Provider Agreements constitutes a pattern of racketeering activity because the literature and representations to the physician is contrary to actual practice
- whether the failure to pay a claim, or the downcoding of a claim according to a new standard other than medical necessity is a breach of contract, and
- whether the Defendants have agreed to lower reimbursement rates and/or slow payment schedules in a conspiracy to keep reimbursements low.

3. Typicality

Because the Provider Plaintiffs have demonstrated a common scheme or course of conduct, they also have shown typicality. *See* Moore's Federal Practice § 23.24[8][d] ("In actions under the Racketeer Influenced and Corrupt Organizations Act (RICO), the typicality requirement is satisfied if the claims of the class representative and the class arise from the same scheme by the defendant to defraud the class members.").

Additionally, even if the Providers have not demonstrated a common scheme or course of conduct, they have still satisfied the typicality requirement because they have demonstrated that their claims, even if factually different, arise out of the same legal theories as detailed in the Consolidated Amended Complaint. *See, e.g., In re Central States Bakery Antitrust Litigation*, 86 F.R.D. at 415; *Walco*, 168 F.R.D. at 326 (holding "minor factual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members, and if it is based on the same legal theory.").

4. Adequacy

a. Counsel

The Defendants argues [*sic*] again that some of Plaintiffs' counsel, specifically the lawyers in the firm of Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A., are inadequate because they represent the conflicting interests of the Provider Plaintiffs and Subscriber Plaintiffs.

As previously mentioned, this court has already determined that the proposed class counsel are knowledgeable and posses extensive experience in complex class action litigation including federal RICO and ERISA claims. Plaintiffs' counsel are committed to the vigorous prosecution of this action and possess both the skills and competence necessary for such efforts. Additionally, each named Plaintiff has filed a Consent regarding the representation. Thus, this Court is in no position to find Plaintiffs' counsel inadequate in this representation.

b. Named Representatives

The Defendants argue the representative Plaintiffs' interests are antagonistic to those of the absent class members. First, contrary to the relief requested in the complaint, Plaintiffs Porth and Kelly both testified they are bringing the lawsuit for policy reasons, rather than monetary damages.

Second, the Defendants proffer an equal treatment versus equal impact dichotomy: Even if all providers treated the same by identical computer program, this evidence "would still fall far short of establishing that all providers in the class were impacted or harmed in the same manner and to the same extent by such treatment." (Aetna Brief at 47.) Plaintiffs Porth and Burgess have not provided evidence that providers in the class are roughly comparable in terms of number, dollar amount, or type of claims submitted. Downcoding, bundling, slow payment, denial and restriction of capitation payments would seem to affect doctors differently. Therefore, the Plaintiffs' "attempt to substitute for [an] individualized analysis a contrived damages model that simply shoehorns those varying claims into a uniform model . . . necessarily disadvantag[es] those class members with the best claims." (Aetna Brief at 48.)

The Plaintiffs do not respond to these arguments. However these arguments address the typicality and commonality prongs of Rule 23(a), and not the adequacy of the named Plaintiffs. The Defendants have not demonstrated that the named Plaintiffs' interests are antagonistic, but merely that their claims may differ. This is not enough to defeat adequacy. *Griffin,* 755 F.2d at 1533.

B. Rule 23(b)(2)

Plaintiffs seek certification pursuant to 23(b)(2) for injunctive relief, in the event the Court should decline 23(b)(3) certification. Because the Court grants certification pursuant to 23(b)(3), it does not address the issue of 23(b)(2) certification at this time.

C. Rule 23(b)(3)

1. Predominance

The Court must find common issues of law or fact predominate over individual issues. The Defendants argue the Rule 23(b)(3) requirement is not met here because individual

issues will predominate over issues common to the class. Specifically, Defendants claim that individual questions of reliance predominate as to Plaintiffs' RICO and fraud claims.

Where the alleged wrong involves a conspiracy and joint efforts to monopolize and restrain trade, however, courts have found that common questions of law and fact predominate. *In re Infant Formula*, 1992 WL 503465 at *6 (N.D. Fla. 1992) ("Courts have consistently found the conspiracy issue the overriding, predominant question").

Numerous issues are common to all claims and, in fact, predominate in this action including Defendants' medical necessity requirements, Defendants' use of actuarial guidelines, Defendants' use of automated claims system and comparable software capable of adjusting CPT codes and reimbursement rates and automatically delaying and denying claims as well as other uniform activities designed to deny, delay or decrease reimbursement or payments to physicians. In addition, the global class issue of whether a conspiracy exists and, if so, the extent of its impact is necessarily a common question which predominates in this action. Likewise, the Defendants have aided and abetted each other in violation of RICO and in furtherance of a common scheme which predominates in this action.

Because is [*sic*] a common scheme is alleged and demonstrated by the evidence here, there are no individual issues of reliance. Thus, the common issues and common scheme predominate.

2. Superiority

Plaintiffs have also shown that class action is a superior method of adjudicating the dispute. The issue here is whether the Defendants engaged in a conspiracy and common course of fraudulent conduct to automatically delay, deny and down-code payments to the Plaintiffs. In light of the number of potential claimants and the common scheme, this Court finds

it is desirable to concentrate this action in this forum in order to prevent duplication of effort and possible inconsistent results. There are no unsurmountable difficulties with managing this case as a class action. Reliance, causation and damages *may* create complications during the course of this litigation, however, the potential difficulties are nowhere near the magnitude of problems that could arise from 600,000 separate actions. Therefore, this Court concludes that a class action is a superior method for the adjudication of this controversy.

3. Damages

Although not certain damages will be proven on a class wide basis, the Plaintiffs have shown that they *could* be proven class wide. At this stage of the litigation, that is all that is necessary. *See Morris v. Transouth Financial Corp.*, 175 F.R.D. 694, 700-01 (M.D. Ala. 1997) ("The plaintiffs at this stage of the litigation have convinced the Court that the computation of class damages would be mechanical and without the necessity of individualized hearing. However, even if individualized facts specific inquiries involved, the issues common to the class still predominate."). If, at a later date, and further discovery, it is shown that damages cannot be proven on a class wide basis, this Court can revisit whether class certification is still appropriate.

IV. Conclusion

Subscriber Track

To the extent that there are common issues of law and fact present in this case, they do not predominate, and this case, if treated as a class action, would not be manageable, as it includes 145 million members. It is neither convenient nor desirable to accord class status to this case given its factual and legal complexities. Thus, class certification is DENIED.

Provider Track

This Court finds that Provider Plaintiffs have met the necessary elements of rule 23. Thus, class certification is GRANTED. The Court also notes this conditional class is subject to decertification if, at a later stage in the litigation, Plaintiffs have failed to prove reliance, even by circumstantial evidence.

DONE AND ORDERED in Chambers at Miami, Florida, this 26th day of September, 2002.

s/ Federico A. Moreno
FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

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APPENDIX B

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed September 1, 2004]

No. 02-16333
D.C. Docket No. 00-01334-MD-FAM

LEONARD J. KLAY, M.D., CHARLES B. SHANE, M.D., ALL PLAINTIFFS, PRICE PLAINTIFFS, PRICE, SESSA, KATZ & YINGLING, PROVIDER PLAINTIFFS, et al.,

Plaintiffs-Appellees,

versus

HUMANA, INC., FOUNDATION HEALTH SYSTEMS, INC., n.k.a. HEALTH NET, INC., PACIFICARE HEALTH SYSTEMS, INC., PACIFICARE OPERATIONS, INC., THE PRUDENTIAL INSURANCE CO. OF AMERICA, UNITEDHEALTH GROUP, INC., f.k.a. UNITED HEALTHCARE CORP., UNITEDHEALTH CARE, INC., WELLPOINT HEALTH NETWORKS, INC.,

Defendant-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

September 1, 2004

Before TJOFLAT, BIRCH and GOODWIN*, Circuit Judges.

TJOFLAT, Circuit Judge:

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* Honorable Alfred T. Goodwin, United States Circuit Judge for the Ninth Circuit, sitting by designation.

This is a case of almost all doctors versus almost all major health maintenance organizations (HMOs), coming before us for the third time in as many years; there have been twenty-one published orders and opinions in this case from various federal courts. The plaintiffs are a putative class of all doctors who submitted at least one claim to any of the defendant HMOs between 1990 and 2002. They allege that the defendants conspired with each other to program their computer systems to systematically underpay physicians for their services. We affirm the district court's certification of the plaintiffs' federal claims, though we strongly urge the district court to revisit the definition of these classes, and reverse the district court's certification of the plaintiffs' state claims. We do not reach the district court's certification of a California Subclass since the defendants did not specifically challenge the certification on appeal.

I.

The plaintiffs are physicians who were reimbursed by one or more of the defendant HMOs for treating patients covered by those HMOs. The plaintiffs allege that the backbone of their relationship with the HMOs is that they "will be paid, in a timely manner, for the covered, medically necessary services they render." Provider Plaintiffs' Second Amended, Consolidated Class Action Complaint, ¶ 4 (Sept. 19, 2002) (hereinafter, Second Complaint).[1] In a phrase that will undoubtedly play well with a jury, the doctors alliteratively claim that the defendants systematically "deny, delay and diminish the payments due to [them]," id. ¶ 5, and fail to tell doctors that they are being underpaid, id. ¶ 78. The complaint alleges that the defendants' reimbursement system is based on

> covertly denying payments to physicians based on financially expedient cost and actuarial criteria rather than

[1] We quote from the plaintiffs' second amended complaint because it sets forth the material facts of this case most clearly; the substance of the allegations is the same across all three of the plaintiffs' complaints.

> medical necessity, processing physicians' bills using automated programs which manipulate standard coding practices to artificially reduce the amount they are paid, and . . . systematically delaying payments to gain increased use of the physicians' funds.

Id. ¶ 6.

If an agreement between a physician and an HMO exists, its terms govern the physician's reimbursement. The HMOs also "represent to the medical profession at large" that when a physician treats a patient who belongs to an HMO with which the physician does not have a contract, the HMO will still reimburse him. Among the ways in which the defendants allegedly convey this information are "[b]y disseminating billing information to the profession at large," "confirming coverage for medically necessary services when contacted by doctors prior to treatment," and "explaining payments so as to make it appear that doctors are being paid for the covered, medically necessary services they render." Id. ¶¶ 77(c), (d), (f).

The complaint alleges that physicians under contract with HMOs are compensated through one of two different methods—fee-for-service or capitation. Physicians who do not have a contractual relationship with an HMO are reimbursed only under a fee-for-service regime. See id. ¶¶ 79, 101. Although the plaintiffs allege that they are being systematically underpaid under both payment methods, the exact ways in which this is purportedly accomplished differ; we will consider each reimbursement scheme in turn.

A.

Under a fee-for-service plan, an HMO agrees to reimburse doctors for any medically necessary services they perform on covered individuals, whether or not those doctors are under contract with the HMO. This gives doctors an incentive to perform as many tests and procedures as they can convince

the HMO are medically necessary; HMOs, in contrast, have an incentive to approve as few procedures as possible. Both parties claim they are acting in their patients' best medical interests.

To claim reimbursement, physicians are required to fill out an HCFA-1500 form, developed by the federal government and the American Medical Association. These forms employ a "current procedural terminology" coding procedure ("CPT coding") whereby medical procedures are identified by standardized designators. Each designator is comprised of two components: a "base code" that identifies the nature of the procedure and a series of modifiers "for the degree of difficulty, complexity and multiplicity." Id. ¶ 80. Each HCFA-1500 form is processed by the defendants' computer systems, which specify the amount that the physician should be paid.

The plaintiffs allege that these computer systems are programmed to systematically underpay the plaintiffs through a variety of methods. First, the plaintiffs allege that the systems are programmed to simply deny reimbursement for certain base codes that insurance companies feel are too expensive, notwithstanding their contractual obligations to both physicians and patients. Id. ¶ 84. Second, the plaintiffs allege that when the systems read certain base codes on HCFA-1500 forms, they are programmed to interpret them as requesting reimbursement for less expensive procedures ("down-coding"). Id. ¶ 86. Third, the plaintiffs contend that the system is programmed to simply group certain base codes together, so that if the system reads certain combinations of codes on the forms, they will be interpreted as being only a single code ("grouping"). Id.

Fourth, the system is allegedly programmed to ignore certain modifiers that would drive up physicians' reimbursements. Id. ¶ 90. Fifth, the plaintiffs assert that the system is designed to unnecessarily put their reimbursement claims in a "state of suspense before they are processed even though no

additional information is needed or requested. . . . The end result is that average payment times exceed by multiples the time provided for by law in most states as well as the time set by contract and industry practice." Id. ¶¶ 94, 96. Finally, the plaintiffs allege that the forms the HMOs send to physicians explaining the amounts of their reimbursements, called "explanation of benefits" forms ("EOBs"), "misrepresent or conceal the actual manner in which Plaintiffs' . . . payment requests were processed so as to induce them to accept reduced payments in reliance thereon." Id. ¶ 98.

B.

Even plaintiffs whose contracts establish a capitation payment plan are not free from the defendants' alleged manipulation. Under a capitation agreement, each patient specifies a physician as his "primary care provider." The HMO is obligated to pay each physician a small monthly fee, called a capitation payment, for each patient registered to him. The physician, in turn, is obligated to provide whatever medical services each registered patient requires. Thus, a capitation system is a flat-rate scheme in which a physician's payments are "based on the number of patients they agree to treat rather than on the services they actually render." Id. ¶ 7. A capitation method gives a physician an incentive to provide as few services as possible to each patient, whether or not medically necessary, because his payments are not tied to the quality or extent of services he provides. The HMOs, in turn, have an incentive to register as few patients as possible with each physician, so as to reduce their monthly per-patient outlays.

The plaintiffs contend that the HMOs are underpaying physicians by failing to pay capitation fees for many patients who have registered with a physician but never visited him. Id. ¶ 105. Consequently, plaintiffs allege, they are receiving capitation payments based on a much smaller pool of patients than that to which they are entitled.

This is not the only way in which the defendants have allegedly cheated doctors reimbursed under a capitation scheme. Before sending physicians their capitation payments, HMOs withhold a small amount of money to establish a "pharmacy risk pool," which is used to pay for their insured patients' medication. The plaintiffs contend that the defendants are withholding too much from their capitation reimbursements because they are basing the withholdings on the actual cost of the drugs the patients are using, without taking into account "the substantial rebates/refunds/discounts granted by drug manufacturers." Id. ¶ 106.

The defendants are also contractually obligated to pay the plaintiffs an extra bonus if there is money left in the pharmaceutical risk fund at the end of the year after all of the patients' covered medications have been paid for. The plaintiffs allege, however, that defendants somehow "adjust" the year-end statements for the risk fund so as to avoid making these payments. Id. ¶ 107. Finally, not all services are covered by the capitation plan; for certain non-covered services, physicians are required to submit HCFA-1500 forms. The plaintiffs allege that when capitation-plan doctors submit these forms, they are subjected to the same types of fraudulent behavior as the fee-for-service doctors, discussed in the previous Section.

C.

The plaintiffs sued a variety of large HMOs because they claim that these practices are not occurring in isolation, but are instead the end-product of a decades-long nefarious conspiracy to undermine the American health care system. The plaintiffs assert that such a conspiracy was necessary to permit these practices to continue, because "[i]f only one Defendant engaged in these activities, physicians could and would refuse to do business with that Defendant, but together Defendants have the power and influence necessary to affect and perpetuate their scheme." Id. ¶ 118. To support this

allegation, the plaintiffs point to the fact that most of the HMOs run their reimbursement processes in substantially the same way, id. ¶ 119, and participate in various industry groups, trade associations, and standards-promulgation projects, id. ¶ 120.

D.

This case originated when lawsuits were filed in four federal judicial districts against Humana, Inc., for underpaying doctors in the manners described above. These suits were consolidated by the Judicial Panel on Multidistrict Litigation (the "Panel") in the Southern District of Florida. In re Humana Managed Care Litig., No. 1334, 2000 U.S. Dist. LEXIS 5099 (J.P.M.L. Apr. 13, 2000). Later, the Panel decided to combine the suits against Humana with several other similar federal suits from across the country filed against other major HMOs. In re Humana Managed Care Litig., Nos. 1334, 1364, 1366 & 1367, 2000 U.S. Dist. LEXIS 15927 (J.P.M.L. Oct. 23, 2000). The Panel found that these suits "involve[d] common questions of fact concerning whether defendants—either singly or as part of a conspiracy—implemented certain policies, including inter alia utilization review processes, physician financial incentives, and/or failure to pay clean claims in a timely manner which . . . unlawfully interfered with health care providers' delivery of . . . care." Id. at *7-8. It further held,

> Centralization of all the actions under Section 1407 in the Southern District of Florida . . . will serve the convenience of the parties and witnesses and promote the just and efficient conduct of this litigation. Congregating all these actions there is necessary in order to avoid duplication of discovery, prevent inconsistent or repetitive pretrial rulings, and conserve the resources of the parties, their counsel and the judiciary. As a result, resolution of overlapping issues, such as class certification, any common practices, and the nature and existence of any conspiracy, will be streamlined.

Id. at *8. Separate federal proceedings against CIGNA were later consolidated into this suit in In re Managed Care Litig., 246 F. Supp. 2d 1363, 1364 (J.P.M.L. 2003).

Once the cases were consolidated, the plaintiffs filed an amended complaint against all of the defendants, see First Consolidated, Amended Class Action Complaint (Mar. 26, 2001) (hereinafter, First Complaint). It requested that the district court certify three classes. First, the plaintiffs requested certification of a Global Class, including "[a]ll medical doctors who provided services to any person insured by any defendant from August 14, 1990 to [the date of certification]," to pursue their claims that the defendants conspired to violate the Racketeer Influenced and Corrupt Organizations Act (RICO), and aided and abetted each other in doing so. Id. ¶ 119 (brackets in original). Second, the plaintiffs sought recognition of a National Subclass, comprised of all "[m]edical doctors who provided services to any person insured by a Defendant, when the doctor has a claim against such Defendant and is not bound to arbitrate the claim," to pursue various state-law claims against the defendants, as well as claims based on "direct" (substantive, as opposed to inchoate) RICO violations.[2] Id. ¶ 120. Finally,

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[2] The district court certified a Global Class, comprised of all doctors, whether or not they had arbitration clauses, to pursue RICO claims based on aiding and abetting and conspiracy because it held that such causes of action were non-arbitrable. It certified a National Subclass, comprised only of doctors not subject to enforceable arbitration clauses, to pursue the substantive RICO claims because those claims were ultimately held by the Supreme Court to be arbitrable. See PacifiCare Health Sys. v. Book, 538 U.S. 401, 407, 123 S. Ct. 1531, 1536, 155 L. Ed. 2d 578 (2003) ("[T]he proper course is to compel arbitration" of the direct RICO claims.); see also In re Managed Care Litig., MDL No. 1334, at 8 (S.D. Fla. Sept. 15, 2003) ("[A]ll direct RICO claims that stem from contractual relationships subject to arbitration must be arbitrated, notwithstanding any clauses limiting the availability of punitive, exemplary or extra-contractual damages.").

the plaintiffs requested certification of a California Subclass, comprised of "[m]edical doctors who provided services to any person insured in California by any defendant, when the doctor was not bound to arbitrate the claim being asserted," to pursue alleged violations of Cal. Bus. & Prof. Code § 17200. Id. ¶ 121. The district court certified all three classes, In re Managed Care Litig., 209 F.R.D. 678 (S.D. Fla. 2002), and the HMOs now appeal.

For a district court to certify a class action, the named plaintiffs must have standing, and the putative class must meet each of the requirements specified in Federal Rule of Civil Procedure 23(a),[3] as well as at least one of the requirements set forth in Rule 23(b).[4] City of Hialeah v.

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[3] This Rule states:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

[4] This Rule states:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

Rojas, 311 F.3d 1096, 1101 (11th Cir. 2002); Turner v. Beneficial Corp., 242 F.3d 1023, 1025 (11th Cir. 2001). The classes in this case were certified under Rule 23(b)(3), which states that a class action may be certified if "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

In this appeal, the defendants do not challenge the standing of the named plaintiffs or any of the district court's findings concerning Rule 23(a); they contend only that certification under Rule 23(b)(3) was improper. They raise three separate arguments. First, they contend that common questions of law and fact concerning the federal claims do not predominate

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(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;

(D) the difficulties likely to be encountered in the management of a class action.

Fed. R. Civ. P. 23(b).

over individual issues specific to each plaintiff. They next make the same argument regarding the plaintiffs' state law claims. Finally, for both the federal and state claims, they contend that, regardless of whether common issues of law and fact predominate, a class action is inferior to other methods of adjudicating them. We address each of these arguments in separate Parts.

"The decision to certify is within the broad discretion of the district court . . . ." Castano v. Am. Tobacco Co., 84 F.3d 734, 740 (5th Cir. 1996). However, with great power comes great responsibility; the awesome power of a district court must be "exercised within the framework of rule 23." Id. We apply an abuse of discretion standard in reviewing the district court's class certification rulings. Hines v. Widnall, 334 F.3d 1253, 1255 (11th Cir. 2003).

> A district court abuses its discretion if it applies an incorrect legal standard, follows improper procedures in making the determination, or makes findings of fact that are clearly erroneous. A district court may also abuse its discretion by applying the law in an unreasonable or incorrect manner. Finally, an abuse of discretion occurs if the district court imposes some harm, disadvantage, or restriction upon someone that is unnecessarily broad or does not result in any offsetting gain to anyone else or society at large. In making these assessments, we review the district court's factual determinations for clear error, and its purely legal determinations de novo.

Klay v. United Healthgroup, Inc., No. 02-16640, U.S. App. LEXIS 13492 (11th Cir. June 30, 2004) (quotation marks and citations omitted).

II.

The defendants' first claim is that the district court erred in certifying a Global Class to pursue federal RICO claims based on conspiracy and aiding-and-abetting, and a National Class to pursue federal claims based on "direct" RICO

violations, because the common issues of fact and law these claims involve do not predominate over individualized issues. Section A explains the substance of the plaintiffs' RICO claims in order to determine the issues of fact and law that are implicated. Section B analyzes our circuit's precedents concerning whether common issues of fact and law predominate over individualized ones under Rule 23(b)(3). Section C applies these principles to the RICO claims in this case, concluding that the district court did not abuse its discretion in certifying classes to litigate these claims. Finally, although we conclude that the district court acted within the proper scope of its power, Section D offers an observation that we strongly urge the court to consider in potentially redefining the scope of these classes.

A.

To understand the plaintiffs' RICO claims, it is necessary to first examine two of the central elements upon which they are predicated—the "pattern of racketeering activity" in which the defendants allegedly engaged, and the "enterprise" to which this racketeering activity was allegedly related. To violate RICO, a defendant must engage in a pattern of racketeering activities. RICO designates the violation of certain federal criminal laws as "racketeering activities," see 18 U.S.C. § 1961(1). The plaintiffs contend that the defendants committed racketeering activities by engaging in mail and wire fraud, in violation of 18 U.S.C. §§ 1341 and 1343; extortion, in violation of 18 U.S.C. §§ 1951(a) and (b)(2); and violations of the Travel Act, 18 U.S.C. § 1952(a)(3).[5]

The defendants allegedly committed mail and wire fraud by withholding from the plaintiffs information concerning the

[5] The plaintiffs originally alleged that the defendants also engaged in racketeering activity by interfering with benefit plans in violation of 18 U.S.C. § 1954. See First Complaint ¶¶ 264-67. This allegation was dropped from the Third Amended, Consolidated Class Action Complaint (Nov. 25, 2002), so we need not consider it.

various practices described above in Sections I.A and I.B. For example, the plaintiffs allege that the "Defendants misrepresented to Plaintiffs and class members that Defendants would pay Plaintiffs and class members for medically necessary services and procedures according to the CPT codes for the services and procedures they provided." First Complaint ¶ 236. The plaintiffs further contend that the defendants "have concealed and have failed to disclose that they deliberately delay payments . . . [and] that they have developed or purchased claims systems designed to manipulate CPT codes." Id. ¶ 239, 241. Regarding doctors reimbursed under a capitation plan, the plaintiffs maintain that the defendants "have represented that capitation payments are paid upon enrollment of members [and] . . . have failed to disclose their use of age/sex adjustment factors to adjust capitation payments below the levels the Defendants agreed to pay." Id. ¶¶ 245-46.

The defendants allegedly engaged in extortion by

> forc[ing] Plaintiffs and members of the class to accept capitation contracts, accept the loss of compensation for treating Defendants' insureds which results from their misrepresentation and manipulation of the workings of the capitation payment system, and accept the denial, reduction and delay of payments for covered, medically necessary services . . . through fear of economic loss. Defendants create this fear through threats, both veiled and explicit, that doctors will lose the patient base Defendants control, be blacklisted, and in the case of noncontract doctors, not be paid at all.

Third Amended, Consolidated Class Action Complaint ¶¶ 150-51 (Nov. 25, 2002) (hereinafter, Third Complaint).[6]

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[6] The district court's class certification decision was, of course, based on the First Complaint. However, we will base our class certification ruling on the Third Complaint—apparently the most recent complaint filed in this case—when it pleads a claim better than the First Complaint,

The final racketeering activity in which the defendants allegedly engaged was violating the Travel Act, which makes it a crime to "travel[] in interstate or foreign commerce or use[] the mail or any facility in interstate or foreign commerce, with intent to . . . promote, manage, establish, carry on or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity." 18 U.S.C. § 1952(a)(3). The defendants purportedly used "the mail or other facilities of interstate commerce . . . to carry on their extortion" as described above. Third Complaint ¶ 154.

Having laid out the various racketeering activities in which the defendants allegedly engaged, we now turn to the enterprise to which these activities were ostensibly related. The plaintiffs assert that the defendants belonged to a shadowy, mysterious "Managed Case Enterprise" that included other health insurance companies not named as defendants, the companies that developed the claims-processing software the defendants use, companies that review claims for the defendants, and several trade, standards-setting, and industry organizations and associations to which the defendants belong or with which the defendants work. This enterprise is a "system that allows [the defendants] to manipulate and control reimbursements to physicians and conceal the manner in which that is done." Third Complaint ¶ 138.

Based on these facts, the plaintiffs allege several different RICO violations. First, they contend that the defendants

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for the sake of judicial economy. If we reversed the district court's certification of a class concerning a particular claim as it is pled in the First Complaint, even though that class might have been certified based on the pleadings in the Third Complaint, we would be engendering much unnecessary litigation. Thus, even though the district court did not formally rule upon the Third Complaint, we will take it into account when it better repleads claims that the district court adjudicated from the First Complaint. As discussed later, however, this ruling does not address counts that are raised for the first time in the Third Complaint.

violated 18 U.S.C. §§ 1962(a) and (c) (Counts III and IV in the First Complaint; Count III in the Third Complaint). Section 1962(a) makes it unlawful for "any person who has received any income, derived directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income . . . [in the] operation of, any enterprise which is engaged in . . . interstate . . . commerce." The defendants allegedly violated this provision by using money they obtained through racketeering activities—that is, underpaying doctors through the dishonest means specified in Sections I.A and I.B, thereby violating the federal criminal laws specified above—to further the Managed Care Enterprise.

18 U.S.C. § 1962(c) makes it unlawful for "any person employed by or associated with any enterprise engaged in . . . interstate . . . commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." The plaintiffs assert that the defendants operated the Managed Care Enterprise by engaging in racketeering activity because the enterprise itself was created to systematically underpay doctors for the services they provide.

Next, the plaintiffs contend that the defendants violated 18 U.S.C. § 1962(d), which prohibits conspiracies to violate other provisions of RICO by conspiring with each other to violate 18 U.S.C. §§ 1962(a) and (c), as discussed above. (Count I in both the First Complaint and Third Complaint). The plaintiffs further assert that the defendants violated 18 U.S.C. § 2 by aiding and abetting each other in violating 18 U.S.C. §§ 1962(a) and (c), as discussed above. (Count II in both the First Complaint and Third Complaint). Finally, based on these allegations, the plaintiffs seek injunctive and declaratory relief. (Count X in the First Complaint; Count IV in the Third Complaint). Having explained the federal claims for which the plaintiffs sought class certification, we now

explore the "predominance" analysis mandated by Rule 23(b)(3).

B.

The defendants' main contention is that the district court erred in certifying classes to litigate the RICO claims discussed above because the common issues of fact and law these claims involve do not predominate over the individualized issues involved that are specific to each plaintiff. Under Rule 23(b)(3), "[i]t is not necessary that all questions of fact or law be common, but only that some questions are common and that they predominate over individual questions." In re Theragenics Corp. Secs. Litig., 205 F.R.D. 687, 697 (N.D. Ga. 2002). In determining whether class or individual issues predominate in a putative class action suit, we must take into account "the claims, defenses, relevant facts, and applicable substantive law," Castano, 84 F.3d at 744, to assess the degree to which resolution of the classwide issues will further each individual class member's claim against the defendant.[7]

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[7] In determining whether individual or collective issues predominate, we look not only to the plaintiff's allegations, but also to any compulsory counterclaims that the defendant can be expected to bring or permissive counterclaims that the defendant has already brought. See Heaven v. Trust Co. Bank, 118 F.3d 735, 738 (11th Cir. 1997) (rejecting class certification in part because the class members, as "counterclaim defendants[,] would be compelled to come forward with individual defenses" that would "require the court to engage in multiple separate factual determinations"). We do not, however, take into account permissive counterclaims that the defendant has yet to bring because it is possible they will not actually be brought and the district court can reconsider its certification decision once they have been filed. See Roper v. Consurve, Inc., 578 F.2d 1106, 1116 (5th Cir. 1978); see also Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (adopting as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981); Brown v. SCI Funeral Servs. of Fla., Inc., 212 F.R.D. 602, 607 (S.D. Fla. 2003) ("[I]f the Court, following certification, concludes that

"Whether an issue predominates can only be determined after considering what value the resolution of the class-wide issue will have in each class member's underlying cause of action." Rutstein v. Avis Rent-A-Car Sys., 211 F.3d 1228, 1234 (11th Cir. 2000). Common issues of fact and law predominate if they "ha[ve] a direct impact on every class member's effort to establish liability and on every class member's entitlement to injunctive and monetary relief." Ingram v. Coca-Cola Co., 200 F.R.D. 685, 699 (N.D. Ga. 2001). Where, after adjudication of the classwide issues, plaintiffs must still introduce a great deal of individualized proof or argue a number of individualized legal points to establish most or all of the elements of their individual claims, such claims are not suitable for class certification under Rule 23(b)(3). See Perez v. Metabolife Int'l, Inc., 218 F.R.D. 262, 273 (S.D. Fla. 2003) (declining class certification in part because "any efficiency gained by deciding the common elements will be lost when separate trials are required for each class member in order to determine each member's entitlement to the requested relief").

An alternate formulation of this test was offered in Alabama v. Blue Bird Body Co., 573 F.2d 309 (5th Cir. 1978). In that case, we observed that if common issues truly predominate over individualized issues in a lawsuit, then "the

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the counterclaims make the class unmanageable, the Court has the continuing authority under Rule 23 to issue a supplemental order excluding counter-claim defendants from the plaintiff class . . . ."). Indeed, even where a defendant files a counterclaim, he must adduce some evidence in support of it before a court will take it into account as a reason for declining to certify a class. The defendants in this case have not pointed to any permissive counterclaims they have already filed, or compulsory counterclaims they are likely to file, against substantial numbers of class members. Consequently, in determining whether individual or collective issues predominate in this class action, we consider only the evidentiary and legal issues arising from the allegations contained in the complaint and the defenses raised against them.

addition or subtraction of any of the plaintiffs to or from the class [should not] have a substantial effect on the substance or quantity of evidence offered." Id. at 322. Put simply, if the addition of more plaintiffs to a class requires the presentation of significant amounts of new evidence, that strongly suggests that individual issues (made relevant only through the inclusion of these new class members) are important. Id. ("If such addition or subtraction of plaintiffs does affect the substance or quantity of evidence offered, then the necessary common question might not be present."). If, on the other hand, the addition of more plaintiffs leaves the quantum of evidence introduced by the plaintiffs as a whole relatively undisturbed, then common issues are likely to predominate.

C.

In certifying the plaintiffs' RICO claims, the district court found that common questions of fact and law predominate because this case "involves a conspiracy and joint efforts to monopolize and restrain trade." Managed Care Litig., 209 F.R.D. at 696. The common factual issues that predominated over individualized ones included

> Defendants' medical necessity requirements, Defendants' use of actuarial guidelines, Defendants' use of automated claims system and comparable software capable of adjusting CPT codes and reimbursement rates and automatically delaying and denying claims as well as other uniform activities designed to deny, delay or decrease reimbursement or payments to physicians.

Id. The existence of a conspiracy, and whether the defendants aided and abetted each other, were also issues common to all of the plaintiffs that tended to predominate. Id. We agree with this analysis.

1.

The plaintiffs here allege the type of nationwide conspiracy which we intimated in Blue Bird Body Co., 573 F.2d 309,

would probably be appropriate for nationwide class certification. In that case, the State of Alabama sought to represent a nationwide class of all governmental entities in the United States that purchased school buses, alleging that the defendants engaged in a nationwide price-fixing conspiracy in violation of federal antitrust laws. The only evidence to which the plaintiffs pointed to support their claims of a nationwide conspiracy, however, was an excerpt from a deposition that referred solely to price-fixing within Alabama. We recognized that the plaintiffs might have intended to establish proof of a nationwide conspiracy "through testimony, exhibits, etc., of the various school bus markets on a state by state basis." Id. at 322. We held,

> If this is indeed the plaintiffs' plan, then the national class should not have been certified since there would be no evidence linking the different conspiracies to each other in order to establish the one "common" conspiracy. Common issues of fact do not predominate in such a situation even though all the plaintiffs might have separate causes of actions against the same defendants based upon similar theories of recovery.

Id. at 323 (footnote omitted). In this case, in contrast, all of the defendants operate nationwide and allegedly conspired to underpay doctors across the nation, so the numerous factual issues relating to the conspiracy are common to all plaintiffs. Cf. Kirkpatrick v. J.C. Bradford & Co., 827 F.2d 718, 725 (11th Cir. 1987) (granting class certification because "each of the complaints alleges a single conspiracy and fraudulent scheme against a large number of individuals and thus is particularly appropriate for class action" (quotation marks and citation omitted)).

This case stands in stark contrast to many others in which we found individualized issues to predominate. For example, in Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999 (11th Cir. 1997), a putative class of African-American plaintiffs

sued Motel 6, alleging that the chain either denied African-Americans accommodations altogether, or rented them only dirty rooms. We declined to certify the class because the plaintiffs' claims would have "require[d] distinctly case-specific inquiries into the facts surrounding each alleged incident of discrimination." Id. at 1006. We explained:

> The issues that must be addressed include not only whether a particular plaintiff was denied a room or was rented a substandard room, but also whether there were any rooms vacant when that plaintiff inquired; whether the plaintiff had reservations; whether unclean rooms were rented to the plaintiff for reasons having nothing to do with the plaintiff's race; whether the plaintiff, at the time that he requested a room, exhibited any non-racial characteristics legitimately counseling against renting him a room; and so on . . . . These issues are clearly predominant over the only issue arguably common to the class—whether Motel 6 has a practice or policy of racial discrimination.

Id.

We came to the same conclusion in Rutstein, 211 F.3d 1228, where we denied class certification to a group of plaintiffs alleging that Avis refused to establish corporate accounts for Jewish companies. We held that each plaintiff's individualized allegations necessarily predominated over the issue of whether Avis had discriminatory policies because "[e]ach plaintiff [would] have to bring forth evidence demonstrating that the defendant had an intent to treat him or her less favorably because of the plaintiff's Jewish ethnicity." Id. at 1235. We explained that individual claims for discrimination are inextricably bound up in innumerable case-specific facts, for "even if [the] plaintiffs [could] demonstrate that a general policy or practice of discrimination was applied in their cases, Avis [could] escape liability by showing that an

individual plaintiff would have been denied or terminated even if no such policy or practice had existed." Id. at 1236.

> The individual issues that must be addressed [regarding each individual plaintiff] include not only whether Avis actually denied a particular plaintiff a corporate account, gave the plaintiff a less advantageous account, or cancelled the plaintiff's account, but also whether the particular plaintiff was of the age required by Avis to qualify for a corporate account; whether the plaintiff met the financial criteria for a corporate account; whether the nature of the plaintiff's expected use of Avis vehicles would make the transaction cost-justified for Avis; whether the plaintiff would be renting cars from Avis in a criminally high-risk or low-risk geographical area; whether the Avis employee who allegedly denied the plaintiff a corporate account judged the caller-applicant to be lying about his or her qualifications based on information not related to the caller's ethnicity; and so on, and so on. All of these issues are clearly case-specific, and they will all have to be addressed in one way or another in order for each plaintiff to demonstrate a prima facie case of intentional discrimination.

Id. at 1235.

Motel 6 and Rutstein were both cases in which individuals were seeking to litigate separate discrimination claims that arose from a variety of individual incidents together in the same class action simply because they alleged that the acts of discrimination occurred pursuant to corporate policies. In the instant case, however, the plaintiffs' RICO claims are not simply individual allegations of underpayments lumped together, and the allegation of an official corporate policy or conspiracy is not simply a piece of circumstantial evidence being used to support such individual underpayment claims. Instead, the very gravamen of the RICO claims is the "pattern of racketeering activities" and the existence of a national conspiracy to underpay doctors. These are not facts from which

jurors will be asked to infer the commission of wrongful acts against individual plaintiffs; these very facts constitute essential elements of each plaintiff's RICO claims. While the existence of a policy of discrimination did not constitute an element of any of the causes of action in Rutstein or Motel 6, the existence of a general conspiracy to violate certain federal laws, or a pattern and practice of aiding and abetting other HMOs' violations of those laws, is an essential element of each individual plaintiff's RICO-related claims. Cf. Rutstein, 211 F.3d at 1235 ("Whether Avis maintains a policy or practice of discrimination may be relevant in a given case, but it certainly cannot establish that the company intentionally discriminated against every member of the putative class."). Thus, while corporate policies were only circumstantially relevant in the discrimination cases, and insufficient to overcome the tremendous individualized issues of fact that remained in those cases, they constitute the very heart of the plaintiffs' RICO claims here, and would necessarily have to be re-proven by every plaintiff if each doctor's claims were tried separately.

2.

The defendants contend that class certification is inappropriate because the RICO claims are based, in large part, on allegations of mail and wire fraud. Under Sikes v. Teleline, Inc., reliance may not be presumed in fraud-based RICO actions; instead, the evidence must demonstrate that each individual plaintiff actually relied upon the misrepresentations at issue. 281 F.3d 1350, 1360, 1362 (11th Cir. 2002) (holding that, to make out a civil RICO claim based on mail or wire fraud, a plaintiff must demonstrate that he "relied on a misrepresentation made in furtherance of [a] fraudulent scheme" because "[i]t would be unjust to employ a presumption to relieve a party of its burden of production when that party has all the evidence regarding that element of the claim"). The defendants contend that, because each individual

plaintiff must specifically show that he, personally, relied on the misstatements at issue, this individualized issue necessarily predominates.

The Fifth Circuit, in Castano, 84 F.3d at 745 (which is not binding upon us), held that, under Simon v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 482 F.2d 880 (5th Cir. 1973) (citations omitted) (which is binding on us), "a fraud class action cannot be certified when individual reliance will be an issue." This is a misinterpretation of Simon, which in fact stated only that

> [i]f there is any material variation in the representations made or in the degrees of reliance thereupon, a fraud case may be unsuited for treatment as a class action. . . . [I]f the writings contain material variations, emanate from several sources, or do not actually reach the subject investors, they are no more valid a basis for a class action than dissimilar oral representations.

Simon, 482 F.2d at 882. As this quote demonstrates, we declined certification in Simon because of the plaintiff's "failure to prove any standardized representations by [the defendant]." Id. at 883. In this case, however, the plaintiffs allege that while the defendants engaged in a variety of specific communications with physicians, they all conveyed essentially the same message—that the defendants would honestly pay physicians the amounts to which they were entitled.

Under well-established Eleventh Circuit precedent, the simple fact that reliance is an element in a cause of action is not an absolute bar to class certification. In Kirkpatrick, 827 F.2d at 720, for example, the plaintiffs sought class certification of their claim that various brokerage firms "disseminat[ed] materially misleading information" concerning the financial condition of a company in which the plaintiffs had purchased limited partnership interests. Among the provisions under which the plaintiffs sought recovery was

Rule 10b-5 (17 C.F.R. § 240.10b-5), promulgated under the Securities and Exchange Act of 1934, 15 U.S.C. § 78j. We reversed the district court's order denying certification under Rule 23(b)(3), concluding that common issues of fact and law predominated over individual issues. The district court's main concern was that each of the plaintiffs was individually obligated to demonstrate his or her reliance on the defendants' misstatements to make out claims under Rule 10b-5. We held, however,

> In view of the overwhelming number of common factual and legal issues presented by plaintiffs' misrepresentation claims, . . . the mere presence of the factual issue of individual reliance could not render the claims unsuitable for class treatment. Here, . . . each of the complaints alleges a single conspiracy and fraudulent scheme against a large number of individuals and thus is particularly appropriate for class action.

Kirkpatrick, 827 F.2d at 724-25 (quotation marks and citation omitted).

We follow Kirkpatrick here for two reasons. First, the common issues of fact discussed in the previous Section, concerning the existence of a national conspiracy, a pattern of racketeering activity, and a Managed Care Enterprise, are quite substantial. They would tend to predominate over all but the most complex individualized issues.

Second, while each plaintiff must prove his own reliance in this case, we believe that, based on the nature of the misrepresentations at issue, the circumstantial evidence that can be used to show reliance is common to the whole class. That is, the same considerations could lead a reasonable factfinder to conclude beyond a preponderance of the evidence that each individual plaintiff relied on the defendants' representations.

The alleged misrepresentations in the instant case are simply that the defendants repeatedly claimed they would reim-

burse the plaintiffs for medically necessary services they provide to the defendants' insureds, and sent the plaintiffs various EOB forms claiming that they had actually paid the plaintiffs the proper amounts. While the EOB forms may raise substantial individualized issues of reliance, the antecedent representations about the defendants' reimbursement practices do not. It does not strain credulity to conclude that each plaintiff, in entering into contracts with the defendants, relied upon the defendants' representations and assumed they would be paid the amounts they were due. A jury could quite reasonably infer that guarantees concerning physician pay—the very consideration upon which those agreements are based—go to the heart of these agreements, and that doctors based their assent upon them. This is a far cry from the type of "presumed" reliance we invalidated in Sikes. Consequently, while each plaintiff must prove reliance, he or she may do so through common evidence (that is, through legitimate inferences based on the nature of the alleged misrepresentations at issue). For this reason, this is not a case in which individualized issues of reliance predominate over common questions.

3.

The defendants point out that individualized determinations are necessary to determine the extent of damages allegedly suffered by each plaintiff. While this is undoubtedly true, it is insufficient to defeat class certification under Rule 23(b)(3). "[N]umerous courts have recognized that the presence of individualized damages issues does not prevent a finding that the common issues in the case predominate." Allapattah Servs. v. Exxon Corp., 333 F.3d 1248, 1261 (11th Cir. 2003), reh'g en banc denied, 362 F.3d 739 (11th Cir. 2004); see, e.g., In re Tri-State Crematory Litig., 215 F.R.D. 660, 692 n.20 (N.D. Ga. 2003) ("The requirement of determination of damages on an individual basis does not foreclose a finding of predominance or defeat certification of the class.").

"[I]n assessing whether to certify a class, the Court's inquiry is limited to whether or not the proposed methods [for computing damages] are so insubstantial as to amount to no method at all. . . . [Plaintiffs] need only come forward with plausible statistical or economic methodologies to demonstrate impact on a class-wide basis." In re Terazosin Hydrochloride Antitrust Litig., 220 F.R.D. 672, 698 (S.D. Fla. 2004) (quotation marks omitted). Particularly where damages can be computed according to some formula,[8] statistical analysis,[9] or other easy or essentially mechanical methods,[10] the fact that damages must be calculated on an individual basis is no impediment to class certification.

It is primarily when there are significant individualized questions going to liability exist that the need for individualized assessments of damages is enough to preclude 23(b)(3) certification. See, e.g., Sikes, 281 F.3d at 1366 ("These claims will involve extensive individualized inquiries on the issues of injury and damages—so much so that a class action is not sustainable."); Rutstein, 211 F.3d at 1234, 1240 (declining to

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[8] E.g., In re Terazosin Hydrochloride Antitrust Litig., 203 F.R.D. 551, 559 (S.D. Fla. 2001) (upholding class certification where the plaintiffs offered an "algebraic formula for the computation of class members' overcharge damages" despite the fact that "the jury will also have to consider some individualized evidence in rendering individual damage calculations").

[9] See Pickett v. IBP, Inc., No. 96-A-1103-N, 2001 U.S. Dist. LEXIS 22453, at *35 (M.D. Ala. Dec. 26, 2001) ("[I]f damages can be computed using 'statistical techniques, the existence of individualized damage claims does not pose a barrier to certification.'" (quoting Moore's Federal Practice § 23.49[5][b])).

[10] E.g., Roper v. Consurve, Inc., 578 F.2d 1106, 1112 (5th Cir. 1978) ("While it may be necessary to make individual fact determinations with respect to charges, if that question is reached, these will depend on objective criteria that can be organized by a computer, perhaps with some clerical assistance. It will not be necessary to hear evidence on each claim.").

certify a class because "most, if not all, of the plaintiffs' claims will stand or fall . . . on the resolution of . . . highly case-specific factual issues" and "liability for damages is a necessarily individualized inquiry"). Of course, there are also extreme cases in which computation of each individual's damages will be so complex, fact-specific, and difficult that the burden on the court system would be simply intolerable, see, e.g., Windham v. Am. Brands, Inc., 565 F.2d 59, 70 (4th Cir. 1977) ("The district court estimated—conservatively, we think—that in the absence of a practical damage formula, determination of individual damages in this case could consume ten years of its time. The propriety of placing such a burden on already strained judicial resources seems unjustified."), but we emphasize that such cases rarely, if ever, come along.

In this case, even though individualized damage inquiries are necessary, many of them can be accomplished simply through reference to the HCFA-1500 forms or the HMO's records of which patients registered with doctors who are reimbursed through a capitation system. Cf. Roper v. Consurve, Inc., 578 F.2d 1106, 1112 (5th Cir. 1978) ("While it may be necessary to make individual fact determinations with respect to charges, if that question is reached, these will depend on objective criteria that can be organized by a computer, perhaps with some clerical assistance."). In addition, even if many plaintiffs' claims require corroboration and individualized consideration, such inquiries are outweighed by the predominating fact that the defendants allegedly conspired to commit, and proceeded to engage in, a pattern of racketeering activities to further their Managed Care Enterprise. It is ridiculous to expect 600,000 doctors across the nation to repeatedly prove these complicated and overwhelming facts.

D.

Because we are reviewing the district court's certifications under an abuse of discretion standard, we affirm. Never-

theless, it seems that the plaintiffs could comfortably be split into two Subclasses based on their reimbursement scheme: those operating on a fee-for-service basis and those with capitation contracts. While the existence of the conspiracy is equally relevant to both groups of plaintiffs, it seems that the capitation providers' claims revolve around some additional common issues that are not relevant to the fee-for-service providers. Moreover, because the capitation providers' primary allegation is that the HMOs did not pay them for all the patients actually registered to them, their individualized damage inquiries seem to be limited to an examination of the HMOs' records, and do not require as much potentially in-depth analysis as the fee-for-service providers' claims. Because this issue was not raised on appeal, however, we leave it to the district court to consider in the first instance whether the creation of these Subclasses might be a superior way of proceeding.

III.

The First Complaint contained five state-law claims. In the plaintiffs' Third Complaint, one of the original state law claims (Count V of the First Complaint, quantum meruit) was dropped, and four additional state-law claims were added (Counts VIII, IX, XI, and XII of the Third Complaint). Because the quantum meruit claim is no longer an issue in this lawsuit, we vacate the district court's grant of class certification regarding that issue. Similarly, because the district court order being appealed did not address the additional state law claims raised for the first time in the Third Complaint, there is nothing for us to review about them. Consequently, we focus on the four remaining state law claims raised in the First Complaint. Section A addresses the breach of contract claims, Section B discusses unjust enrichment, Section C turns to alleged violations of state prompt-pay statutes, and Section D considers the district court's

certification of a subclass concerning alleged violations of California law.

A.

The plaintiffs' breach of contract claims (Count VI in the First Complaint; Count V in the Third Complaint) are not amenable to class certification under Rule 23(b)(3) because, although they are based on questions of contract law that are common to the whole class, the individualized issues of fact they entail will probably predominate. These claims allege that "Defendants have breached their obligation to pay Plaintiffs and class members for medically necessary services in accordance with their contractual obligations." First Complaint ¶ 335.

"In a multi-state class action, variations in state law may swamp any common issues and defeat predominance." Castano, 84 F.3d at 741. It goes without saying that class certification is impossible where the fifty states truly establish a large number of different legal standards governing a particular claim. See Sikes, 281 F.3d at 1367 n.44 ("Assuming that the district court was correct in ruling that the laws of all fifty states apply, that alone would render the class unmanageable."); Andrews v. Am. Tel & Tel. Co., 95 F.3d 1014, 1024 (11th Cir. 1996) ("The appellants cite the need to interpret and apply the gaming laws of all fifty states to assess the legality of each 900-number program as foremost among the difficulties in trying the gambling claims on a class basis, and we agree."); Kirkpatrick, 827 F.2d at 725 (upholding the district court's denial of class certification because "the state law claims would require application of the standards of liability of the state in which each purchase was transacted"). But see In re St. Jude Med., Inc., MDL No. 01-1396, 2004 U.S. Dist. LEXIS 149, at *12 (D. Minn. Jan. 5, 2004) ("[T]he Court is not convinced that it is per se impossible to certify and successfully try a class action involving the laws of 50 states . . . .").

On the other hand, if a claim is based on a principle of law that is uniform among the states, class certification is a realistic possibility. See In re Terazosin Hydrochloride Antitrust Litig., 220 F.R.D. 672, 695 (S.D. Fla. 2004) (noting that because "the essential elements of [the plaintiffs'] antitrust claims do not vary significantly from state-to-state, . . . they are susceptible to proof using common evidence"). In In re GMC Pick-Up Truck Fuel Tank Products Liability Litigation, for example, the Third Circuit held that class certification was appropriate because "we cannot conceive that each of the forty-nine states (excluding Texas) represented here has a truly unique statutory scheme . . . ." 55 F.3d 768, 818 (3d Cir. 1995); cf. Simon, 482 F.2d at 883 (declining class certification in part because "the geographical dispersion of the alleged representations would bring into issue various state common law standards. With no single law governing the entire class, common issues of law cannot be shown to warrant Rule 23 treatment.").

Similarly, if the applicable state laws can be sorted into a small number of groups, each containing materially identical legal standards, then certification of subclasses embracing each of the dominant legal standards can be appropriate. See, e.g., Krell v. Prudential Ins. Co. of Am., 148 F.3d 283, 315 (3d Cir. 1998) ("Courts have expressed a willingness to certify nationwide classes on the ground that relatively minor differences in state law could be overcome at trial by grouping similar state laws together and applying them as a unit."); Walsh v. Ford Motor Co., 807 F.2d 1000, 1017 (D.C. Cir. 1986) (holding that class certification is appropriate where "variations [in state law] can be effectively managed through creation of a small number of subclasses grouping the states that have similar legal doctrines"). In such a case, of course, a court must be careful not to certify too many groups. "If more than a few of the laws of the fifty states differ, the district judge would face an impossible task of

instructing a jury on the relevant law . . . ." In re Am. Med. Sys., 75 F.3d 1069, 1085 (6th Cir. 1996).

The burden of showing uniformity or the existence of only a small number of applicable standards (that is, "group-ability") among the laws of the fifty states rests squarely with the plaintiffs. Walsh, 807 F.2d at 1017 ("[T]o establish commonality of the applicable law, nationwide class action movants must credibly demonstrate, through an extensive analysis of state law variances, that class certification does not present insuperable obstacles.") (quotation marks omitted); Powers v. Gov't Employees Ins. Co., 192 F.R.D. 313, 318-19 (S.D. Fla. 1998) ("To certify a multi-state class action, a plaintiff must prove through 'extensive analysis' that there are no material variations among the law of the states for which certification is sought. If a plaintiff fails to carry his or her burden of demonstrating similarity of state laws, then certification should be denied.") (citation omitted); cf. Carnegie v. Household Int'l, Inc., 220 F.R.D. 542, 549 (N.D. Ill. 2004) (declining class certification because "[i]f the laws of the fifty states all follow one of a small number of identical standards, [the named plaintiff] has not made any attempt to prove that this is the case").

In this case, the plaintiffs allege that the only real legal issue pertinent to their breach of contract claims is the definition of "breach," which does not differ from state to state. Judge Marcus once held, "Whether [a] contract[] . . . has been breached is a pure and simple question of contract interpretation which should not vary from state to state." Indianer v. Franklin Life Ins. Co., 113 F.R.D. 595, 607 (S.D. Fla. 1986), overruled in part on other grounds by Ericsson GE Mobile Communs., Inc. v. Motorola Communs. & Elecs., Inc., 120 F.3d 216, 219 n.12 (11th Cir. 1997); accord Leszczynski v. Allianz Ins., 176 F.R.D. 659, 672 (S.D. Fla. 1997); see also Kleiner v. First Nat'l Bank of Atlanta, 97 F.R.D. 683, 694 (N.D. Ga. 1983) ("The application of various

state laws would not be a bar where, as here, the general policies underlying common law rules of contract interpretation tend to be uniform."). Based on "genius, general knowledge and previous information," Penn. Nat'l Mut. Cas. Ins. Co. v. Barnett, 445 F.2d 573, 575-76 (5th Cir. 1971), we are inclined to agree. A breach is a breach is a breach, whether you are on the sunny shores of California or enjoying a sweet autumn breeze in New Jersey. See Black's Law Dictionary 200 (8th ed. 2004) (defining "breach of contract" as "[v]iolation of a contractual obligation by failing to perform one's own promise").

Moreover, while the plaintiffs' breach of contract claims necessarily implicate the contract law of all fifty states (since members of the putative class practice in every jurisdiction in the country), the defendants fail to argue on appeal that there are any relevant differences in the applicable laws among these jurisdictions. Their brief fails to point to any material differences among state laws addressing breaches of contract. Cf. In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1300-01 (7th Cir. 1995) (declining class certification because the laws of the several states concerning "negligence, including subsidiary concepts such as duty of care, foreseeability, and proximate cause" differed sufficiently from each other that they could not be consolidated into one or a few standards). Consequently, we accept the proposition that the applicable state laws governing contract interpretation and breach are sufficiently identical to constitute common legal issues in this case.

While this relatively simple issue of law is common to all the breach of contract claims, it is far outweighed by the individualized issues of fact pertinent to these claims. The plaintiffs contend that all of the agreements at issue require that doctors be reimbursed at a "reasonable rate" for the "medically necessary" services they provide. We nevertheless recognize that this case involves the actions of many defen-

dants over a significant period of time and that each defendant throughout this period utilized many different form contracts. Indeed, each defendant contracted with different types of care-providing entities, including individual physicians, partnerships, medical practice groups, and the like, each of which necessitated a different type of contract. The sheer number of contracts involved is one factor that makes us hesitant to conclude that common issues of fact predominate; this is not a situation in which all plaintiffs signed the same form contract. See Broussard v. Meineke Disc. Muffler Shops, 155 F.3d 331, 340 (4th Cir. 1998) ("[P]laintiffs simply cannot advance a single collective breach of contract action on the basis of multiple different contracts."); cf. Kleiner, 97 F.R.D. at 692 ("When viewed in light of Rule 23, claims arising from interpretations of a [single] form contract appear to present the classic case for treatment as a class action . . . ."). The plaintiffs might be able to establish by admission, stipulation, or judicial finding of undisputed fact that, notwithstanding their differences in form or language, all the contracts at issue call for "reasonable compensation" for "medically necessary services." See Kleiner, 97 F.R.D. at 694-95 ("[A]t this point[,] the fact that not all contracts are identical is not sufficient to overcome the apparent commonality of issues that they present."). Even assuming, however, that this is a common fact, it, along with the common legal issue of what constitutes a "breach" under state law, is dwarfed by the individualized issues of fact to be resolved.

The facts that the defendants conspired to underpay doctors, and that they programmed their computer systems to frequently do so in a variety of ways, do nothing to establish that any individual doctor was underpaid on any particular occasion. See Rutstein, 211 F.3d at 1235 ("Whether Avis maintains a policy or practice of discrimination may be relevant in a given case, but it certainly cannot establish that the company intentionally discriminated against every member of the putative class."); Motel 6, 130 F.3d at 1006

(holding that plaintiffs alleging racial discrimination had failed to show "predominance" because proof concerning the existence of a general policy of racial discrimination does not show whether any individual plaintiff was actually discriminated against); Ramirez v. DeCoster, 194 F.R.D. 348, 353 (D. Me. 2000) (holding that plaintiffs "do not necessarily satisfy the requirement that questions of law or fact predominate merely by alleging a pattern or practice claim"). The evidence that each doctor must introduce to make out each breach claim is essentially the same whether or not a general conspiracy or policy of breaching existed. For example, regardless of whether facts about the conspiracy or computer programs are proven, each doctor, for each alleged breach of contract (that is, each alleged underpayment), must prove the services he provided, the request for reimbursement he submitted, the amount to which he was entitled, the amount he actually received, and the insufficiency of the HMO's reasons for denying full payment. There are no common issues of fact that relieve each plaintiff of a substantial portion of this individual evidentiary burden. Cf. Terazosin Litig., 220 F.R.D. at 694 ("[W]hen there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class member's individual position, the predominance test will be met.") (quotation marks omited). While allegations concerning the defendants' conspiracy to underpay doctors, or their policy of and aiding and abetting each other in underpaying doctors, went directly to material elements of each individual plaintiff's RICO claim, here they are, at best, merely circumstantial evidence tangentially relevant to each individual plaintiff's breach of contract claim.

Another crucial reason why the plaintiffs cannot establish predominance of classwide facts on their breach of contract claims is that, although each of the defendants allegedly breached their contracts in the same general ways, they did so

through a variety of specific means that are not subject to generalized proof for a large number of physicians. See Andrews, 95 F.3d at 1023 (rejecting class certification because while "at a general level, the predominant issue presented . . . is whether the appellants were involved in the operation of illegal gambling schemes[,] . . . . as a practical matter, the resolution of this overarching common issue breaks down into an unmanageable variety of individual legal and factual issues"). For example, the plaintiffs claim that the defendants often grouped together separate procedures specified on HCFA-1500 forms submitted by doctors, frequently reimbursing them for only one of the procedures actually performed. If the plaintiffs were able to prove that the billing programs automatically grouped together the first and second procedures specified on the HCFA-1500 form, regardless of what they were, paying doctors only for the first, then the breach of contract issue would be subject to generalized proof. After establishing that the computer program worked in this way, the doctors would be able to simply submit their HCFA-1500 forms to the court for an easy determination of damages; no further evidence of breach would be necessary.

This is not the type of allegation the plaintiffs make, however. The algorithms by which the computer programs allegedly groups procedures appear to be much more varied and complicated than this. Instead of applying one specific universal rule to cheat all doctors (e.g. automatically deducting $100 from everyone's claim), the reimbursement programs are instead alleged to apply a variety of more individually tailored rules, each of which applies to only a subset of the plaintiff class. For example, if the doctors proved that the programs automatically grouped together all lung transplants with all heart transplants, reimbursing all doctors who submitted a claim for both only for heart transplants, this fact would be irrelevant to the breach of contract claims of most members of the plaintiff class. Instead, such proof would be relevant only to those doctors

who submitted a reimbursement request for both a heart transplant and lung transplant on the same patient.

For this reason, proof of any given algorithm concerning grouping would be relevant to only a handful of doctors within the class; separate subclasses would have to be established for each allegedly improper grouping formula. The various methodologies employed by these programs "cannot be lumped together and condemned or absolved en masse." Andrews, 95 F.3d at 1024. This is a case in which "numerous plaintiffs suffer varying types of injury . . . through different causal mechanisms, thereby creating many separate issues." Watson v. Shell Oil Co., 979 F.2d 1014, 1023 (5th Cir. 1992), reh'g granted, 990 F.2d 805 (5th Cir. 1993), appeal dismissed, 53 F.3d 663 (5th Cir. 1994). "No one set of operative facts establishes liability. No single proximate cause applies equally to each potential class member and each defendant." In re Northern District of California, Dalkon Shield IUD Prods. Liability Litig., 693 F.2d 847, 853 (9th Cir. 1982).

The same reasoning applies to the plaintiffs' claim that the programs used by the defendants sometimes improperly drop modifiers from doctors' reimbursement requests. For example, a doctor could include a modifier claiming that a particular procedure was "complex," entitling the doctor to greater payment. The plaintiffs allege that the computer systems sometimes improperly drops the modifier, paying the doctor for a "standard" rather than a "complex" procedure, meaning that he receives less than the full amount to which he is entitled.

Because the program does not always automatically drop all modifiers, however, or always ignore a particular modifier under a set of circumstances applicable to most or all applicants (e.g., if it automatically dropped modifiers whenever the total amount of reimbursement sought in a claim was over $200), this allegation is not susceptible to classwide

proof. Even if the plaintiffs were to prove that the computer systems "sometimes" improperly drops "certain" modifiers, this fact would do nothing to further any of the plaintiffs' individual breach of contract claims. Each plaintiff would still have to establish that he submitted a claim containing a modifier warranting increased payment, that use of the modifier was justified in that particular situation, and that the HMO's computer program improperly dropped it. Generalized evidence that the programs sometimes drops modifiers would not help each plaintiff in satisfying his burden of proof of demonstrating that a modifier was improperly dropped in his particular case. Furthermore, even if the plaintiffs were able to establish that modifiers were automatically dropped in particular situations not applicable to most of the 600,000 plaintiffs involved in this case (e.g., the program automatically dropped "complex" modifiers whenever the underlying procedure was a hysterectomy), such proof would be irrelevant to the large majority of doctors who had not submitted a claim for that particular procedure with the particular modifier at issue.

Similar reasoning applies to the other ways in which the HMOs allegedly breached their contracts with the fee-for-service providers, such as the defendants' alleged down-coding and denial of payment practices. While some of the capitation claims may have been suitable for class treatment, no capitation provider subclasses were requested or certified.

This case stands in stark contrast to Allapattah, 333 F.3d 1248, in which we affirmed certification of a class of approximately 10,000 Exxon dealers who sued Exxon Corp. for breaching their dealer agreements by overcharging them for wholesale fuel purchases. The dealers alleged that Exxon had promised them that it would reduce the price of gasoline by 1.7 cents per gallon, but secretly eliminated that price reduction after a few months. Exxon challenged the district court's certification of a class of all Exxon retailers, alleging

"that there were individual issues inherent in each dealer's breach of contract claim and [Exxon Corp.'s] own affirmative defenses." Id. at 1261. We rejected this argument, holding:

> Because all of the dealer agreements were materially similar and Exxon purported to reduce the price of wholesale gas for all dealers, the duty of good faith was an obligation that it owed to the dealers as a whole. Whether it breached that obligation was a question common to the class, and the issue of liability was appropriately determined on a class-wide basis.

Id.

In Allapattah, Exxon cheated all of the plaintiffs in exactly the same way—by secretly eliminating its 1.7 cent-per-gallon price reduction. Once the plaintiffs proved that Exxon engaged in this behavior, each individual plaintiff's breach of contract claim was substantially advanced. In light of this classwide evidence, each individual dealer could demonstrate that Exxon violated his contractual rights simply by demonstrating that he had purchased gas from Exxon during the relevant time period. Here, in contrast, classwide proof that the computer systems were programmed to sometimes cheat doctors in a variety of ways, through a variety of algorithms, does not tend to demonstrate that any particular doctor was cheated on any particular occasion, or by how much.

Roper, 578 F.2d 1106, provides an even better example of why the plaintiffs' contract claims are inappropriate for class certification, even though Roper involved claims brought under the National Bank Act, 12 U.S.C. §§ 85 and 86. In that case, the plaintiffs—over 90,000 credit card holders—contended that their credit card company charged them usurious interest rates, in violation of the National Bank Act, through its policy on when interest started accruing on certain purchases. We held that class certification was appropriate because, if the way in which the credit card company calcu-

lated interest violated applicable laws (a point we did not reach), then the billing program harmed each customer in exactly the same way; the same illegal formula was applied to each, and proof of that formula substantially advanced everyone's claims. Unlike the interest formula at issue in Roper, even if the plaintiffs here were to establish that the defendants engaged in some or all of the practices at issue, they would still need extensive individualized proof regarding which plaintiffs have been harmed and in what ways. Cf. Kennedy v. Tallant, 710 F.2d 711, 717 (11th Cir. 1983) (granting class certification where the defendants "committed the same unlawful acts in the same method against an entire class").

For these reasons, we conclude that, even though the plaintiffs' breach of contract claims involve some relatively simple common issues of law and possibly some common issues of fact, individualized issues of fact predominate. Cf. Graybeal v. Am. Sav. & Loan Ass'n, 59 F.R.D. 7, 15 (D.D.C. 1973) (denying class certification because, "while there may be questions of law or fact common to the members of the proposed class, such questions do not predominate over those questions affecting only individual class members"). Consequently, the district court abused its discretion in certifying these claims for classwide treatment.

B.

The plaintiffs' unjust enrichment claims (Count VII in the First Complaint; Count VI in the Third Complaint) allege that the "Defendants, through the acts and omissions described herein, are in possession of money that is the rightful property of Plaintiffs and the class. As a result, Defendants have been unjustly enriched by their activities." First Complaint ¶¶ 338-39. These claims require the same extensive determinations of individualized fact as the breach of contract claims discussed above because the facts necessary to support the two types of claims are almost identical. The major difference between these claims is not factual but legal: the obligation

underlying a breach of contract claim comes most immediately from a voluntary agreement, whereas the obligation underlying an unjust enrichment claim comes directly from state law (equity). Indeed, in this case the unjust enrichment claims are simply the way in which doctors without contracts with particular HMOs are attempting to state breach of contract-type claims against them. Because individualized factual determinations overwhelm the common issues of fact and law that exist regarding these claims, class certification was inappropriate.

C.

The plaintiffs' next allegation is that the defendant HMOs violated a variety of state prompt-pay statutes by failing to send doctors their reimbursements within certain statutorily established deadlines. The most immediate problem with certifying a nationwide class for this issue is that only thirty-two states have prompt-pay statutes at all, and of those only five states expressly provide a cause of action, with courts in another six states having recognized an implied cause of action under their respective statutes. Even assuming these claims were otherwise certifiable, the district court abused its discretion by certifying them as to a nationwide class of physicians, rather than a subclass confined to a subset of only certain states.

Even a properly restricted subclass, however, would be unable to meet Rule 23(b)(3)'s predominance requirement. There are few common issues of law because, as the defendant HMOs point out, "[s]tates define differently what constitutes a 'clean' claim for payment. States have also adopted different deadlines for making 'prompt' payment. Not surprisingly, given the heavily regulated nature of this field, there are also diverse exceptions and conditions contained in certain states' prompt pay regulations." Opening Brief of Appellants Aetna, et al., at 41-42. Because the

applicable state laws are similar only in their broad contours, class certification is inappropriate.

Compounding the problem of disparate laws is the need for individualized findings of fact. The plaintiffs have failed to allege that the defendants' computer programs always delay payments for every physician, or always delay payments under a particular set of circumstances that applies to most class members. The simple fact that payments are sometimes delayed, or delayed under various sets of particular circumstances that each apply only to a small number of class members, does not give rise to any predominating common questions of fact. Even if the plaintiffs were to establish that the HMOs conspired to delay payments and that payments to physicians were sometimes delayed, that would do nothing to further any individual physician's claim that a particular reimbursement of his was actually held up improperly. Even if a class were certified for this issue, each physician would still have to prove the same facts to make out a prima facie prompt-pay case that he would if his prompt-pay claims were being tried independently. Because there are no common questions of either law or fact that predominate with these claims, certification under Rule 23(b)(3) was improper.

D.

The defendants have failed to challenge the predominance finding implicit in the district court's certification of a California Subclass based on alleged violations of § 17200 of the California Business and Professions Code (Count IX in the First Complaint; Count X in the Third Complaint). The appellants' only mention of this provision is in a somewhat cryptic footnote stating, "In any event, the 17200 class does not provide an independent basis for certification where, as here, the federal claims giving rise to subject matter jurisdiction are not subject to class treatment." Opening Brief of Appellants Aetna, et al., at 41 n.19. Consequently, we deem this issue waived, and do not consider whether this

claim satisfies the "predominance" prong of Rule 23(b)(3). See Chavis v. Clayton County Sch. Dist., 300 F.3d 1288, 1291, n.4 (11th Cir. 2002) ("[I]ssues not argued on appeal are deemed waived, and a passing reference in an appellate brief is insufficient to raise an issue.").

In conclusion, the district court abused its discretion in certifying the plaintiffs' breach of contract, unjust enrichment, and prompt-pay claims because individualized issues of law or fact predominate over common, classwide issues. We do not reach whether the court should have certified a California Subclass alleging violations of the California Business and Professions Code.

IV.

The preceding Parts focused exclusively on whether common issues of fact and law stemming from the plaintiffs' federal and state claims predominate over individualized issues. We held that while the plaintiffs' federal claims satisfy this requirement, their state claims do not.[11] We now turn to whether the plaintiffs' federal claims satisfy the second prong of the Rule 23(b)(3) test—that "a class action is superior to other available methods for the fair and efficient adjudication of the [claims]." Our focus is not on the convenience or burden of a class action suit per se, but on the relative advantages of a class action suit over whatever other forms of litigation might be realistically available to the plaintiffs. See In re Managed Care Litig., 209 F.R.D. 678, 692 (S.D. Fla. 2002) (noting that this factor "requires the Court to determine

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[11] We also noted that the appellants failed to specifically challenge the district court's certification of a California Subclass on "predominance" grounds. Their claims regarding the "superiority" of a class action similarly ignore the California Subclass. Consequently, we need not consider this subclass at all in this appeal, and so the district court's ruling in this regard remains undisturbed (though not specifically affirmed for "law of the case" or "prior panel" rule purposes).

whether there is a better method of handling the controversy other than through the class action mechanism"); Carnegie v. Mut. Sav. Life Ins. Co., No. CV-99-S-3292-NE, 2002 U.S. Dist. LEXIS 21396, at *76-77 (N.D. Ala. Nov. 1, 2002) ("It is only when [management] difficulties make a class action less fair and efficient than some other method, such as individual interventions or consolidation of individual lawsuits, that a class action is improper.") (quoting Herbert B. Newburg & Alba Conte, Newburg on Class Actions § 4.32, at 4-125 (3d ed. 1992)) (alteration in original).

In many respects, the predominance analysis of Part II has a tremendous impact on the superiority analysis of this Part for the simple reason that, the more common issues predominate over individual issues, the more desirable a class action lawsuit will be as a vehicle for adjudicating the plaintiffs' claims. See Motel 6, 130 F.3d at 1006 n.12 ("The predominance and efficiency criteria are of course intertwined. When there are predominant issues of law or fact, resolution of those issues in one proceeding efficiently resolves those issues with regard to all claimants in the class."); Shelley v. AmSouth Bank, No. 97-1170-RV-C, 2000 U.S. Dist. LEXIS 11429, at *26 (S.D. Ala. July 24, 2000) ("[S]uperiority analysis is intertwined with predominance analysis; when there are no predominant common issues of law or fact, class treatment would be either singularly inefficient . . . or unjust.") (quotation marks omitted) (second alteration in original). Rule 23(b)(3) contains a "non exhaustive" list of four factors courts should take into account in making this determination, Miles v. Am. Online, Inc., 202 F.R.D. 297 (M.D. Fla. 2001):

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

> (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; [and]
>
> (D) the difficulties likely to be encountered in the management of a class action.

Fed. R. Civ. P. 23(b)(3). There is no reason to believe that the putative class members in this case have any particular interest in controlling their own litigation, so the first factor does not counsel against class certification. Similarly, there are no class members separately pursuing other cases involving the same claims and parties, see In re Managed Care Litig., 246 F. Supp. 2d 1363, 1364 (J.P.M.L. 2003) (consolidating a separate lawsuit against CIGMA into this multidistrict litigation), so the second specified factor does not aid the defendants, either. The parties focus most of their discussion on the remaining two factors—the desirability of litigating these claims in a single forum, and the manageability of such a large case. We address each of these concerns in turn. We then turn to two additional arguments against class certification raised by the defendants.

A.

The first factor the parties seriously contest is whether it is desirable to concentrate this litigation in a single forum. Once the plaintiffs establish that common issues of fact and law predominate over individualized issues, there are typically three main reasons why it is desirable to litigate multiple parties' claims in a single forum.[12] First, class actions

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[12] We reject the claim that this factor "is relevant only when other class litigation has already been commenced elsewhere." Carnegie v. Mut. Sav. Life Ins. Co., No. CV-99-S-3292-NE, 2002 U.S. Dist. LEXIS 21396, at *75 (N.D. Ala. Nov. 1, 2002) (quoting Herbert B. Newburg & Alba Conte, Newburg on Class Actions § 4.31, at 4-124 (3d ed. 1992)). This

"offer[] substantial economies of time, effort, and expense for the litigants . . . as well as for the [c]ourt." Terazosin Litig., 220 F.R.D> at 700. Holding separate trials for claims that could be tried together "would be costly, inefficient, and would burden the court system" by forcing individual plaintiffs to repeatedly prove the same facts and make the same legal arguments before different courts. Id.; see also Cheney v. Cyberguard Corp., 213 F.R.D. 484, 502 (S.D. Fla. 2003) ("It would be impracticable to permit individual suits by each shareholder of Cyberguard stock during the relevant class period as it is alleged that there are thousands of purchasers who have been injured by the alleged wrongful acts of the Defendants."); Upshaw v. Ga. Catalog Sales, Inc., 206 F.R.D. 694, 701 (M.D. Ga. 2002) ("[E]ven if sufficient incentive existed for individual claimants to pursue their claims separately, class action treatment is far superior to having the same claims litigated repeatedly, wasting valuable judicial resources."). Where predominance is established, this consideration will almost always mitigate in favor of certifying a class.

Second, as the Supreme Court has recognized in a related context, class actions often involve "an aggregation of small individual claims, where a large number of claims are required to make it economical to bring suit. The plaintiff's claim may be so small, or the plaintiff so unfamiliar with the law, that he would not file suit individually . . . ." Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 813, 105 S. Ct. 2965, 2975, 86 L. Ed. 2d 628 (1985); see also Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617, 117 S. Ct. 2231, 2246, 138 L. Ed. 2d 689 (1997) (noting that, in enacting Rule 23(b)(3), "the Advisory Committee had dominantly in mind

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factor calls us to conduct a general examination of "the desirability of concentrating litigation in one forum," Pickett v. IBP, Inc., No. 96-A-1103-N, 2001 U.S. Dist. LEXIS 22453, at *33-34 (M.D. Ala. Dec. 26, 2001), regardless of whether litigation is pending elsewhere.

vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.'") (quoting Benjamin Kaplan, A Prefatory Note, 10 B.C. Indus. & Com. L. Rev. 497, 497 (1969)); Montgomery v. New Piper Aircraft, Inc., 209 F.R.D. 221, 230 (S.D. Fla. 2002) (declining class certification in part because "there is nothing to indicate that individual owners of these aircraft will be precluded from bringing separate legal actions if they so desired"). This consideration supports class certification in cases where the total amount sought by each individual plaintiff is small in absolute terms. Cf. Managed Care Litig., 209 F.R.D. at 693 (rejecting the "[p]laintiffs' assertion that the small size of each member's claims makes class treatment appear to be the only feasible method of adjudication" because "[e]ven small individual claims under RICO can be feasible given the possibility of the award of treble damages and attorneys' fees").[13] It also applies in situations where, as here, the amounts in controversy would make it unlikely that most of the plaintiffs, or attorneys working on a contingency fee basis, would be willing to pursue the claims individually. This is especially true when the defendants are corporate behemoths with a demonstrated willingness and proclivity for drawing out legal proceedings for as long as humanly possible and burying their opponents in paperwork and filings.

Third, it is desirable to concentrate claims in a particular forum when that forum has already handled several preliminary matters.[14] See Lehocky v. Tidel Techs., Inc., 220 F.R.D. 491, 510-11 (S.D. Tex. 2004) ("[T]he value of con-

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[13] We hasten to add, however, that "the text of Rule 23(b)(3) does not exclude from certification cases in which individual damages run high." Windsor, 521 U.S. at 617, 117 S. Ct. at 2246.

[14] The fact that a court may not yet have made any progress in dealing with a class action, however, is not a reason against certifying a class action.

centrating litigation in this forum is great as the Court has already made several rulings in this case thus far."). In this case, various individual claims were consolidated before the district court by the Panel on Multidistrict Litigation, and the court has done a fine job in addressing a wide range of pretrial motions. While such extensive work is by no means necessary for us to conclude that concentration of the claims in a class action in a single forum is desirable, in this case it is impossible to overlook the significant efforts that have already been put into these proceedings. Consequently, the most common factors for assessing whether it is desirable for the plaintiffs' claims to be litigated in a single forum point to class certification in this case.

There are also several reasons courts commonly cite as to why it is particularly undesirable to litigate a class's claims in a single judicial forum. Perhaps most importantly, we assess whether the potential damages available in a class action are grossly disproportionate to the conduct at issue. Where the defendant's alleged behavior is deliberate or intentional, we have had no problem allowing class actions to proceed. Where defendants are being sued for statutory damages for unintentional acts under a strict liability standard, however, courts take a harder look at whether a defendant deserves to be subject to potentially immense liability. See Ratner v. Chem. Bank N.Y. Trust Co., 54 F.R.D. 412, 416 (S.D.N.Y. 1972) (declining to certify a class where a mandatory strict liability statutory penalty scheme would lead to "horrendous, possibly annihilating punishment"). Similar reasoning applies where damages are being sought for technical violations of a "complex regulatory scheme, subject to different reasonable interpretations," London v. Wal-Mart Stores, Inc., 340 F.3d 1246, 1255 n.5 (11th Cir. 2003). In cases where "the defendants' potential liability would be enormous and completely out of proportion to any harm suffered by the plaintiff," we are likely to find that individual suits, rather than a single class action, are the superior method of adjudication. Id.; see

also Roper, 578 F.2d at 1114 (noting our concern with "a fixed minimum penalty of a substantial amount for a technical violation that, if magnified, would exact a punishment unrelated to statutory purposes") (cita-tions omitted).

Although RICO allows for treble damages, these are tied to the actual harm suffered by the plaintiffs; RICO does not guarantee a fixed amount of damages regardless of the gravity of the defendants' behavior. Furthermore, since RICO violations must be intentional, there is no danger that the defendants will be subject to an unjustly harsh verdict for accidental behavior. Finally, because RICO violations are predicated upon serious federal criminal acts, this is not a case where the plaintiffs are attempting to obtain a windfall based on minor or technical violations of a complex regulatory scheme. Thus, the concerns that typically mitigate against concentrating claims in a single forum do not apply in this case.

At least one district court in our circuit has suggested that, in considering whether it is desirable to have all putative class members' claims litigated in a single forum, we should consider whether the theories under which they seek relief are "immature"—that is, relatively new or innovative. In Jacobs v. Osmose, Inc., the district court held,

> Class action treatment is not the superior method for handling this matter. A mass tort such as this cannot properly be certified without a prior track record from which this Court would be able to draw the information necessary to make the predominance analysis required under Rule 23. Certification of an 'immature' tort results in a higher than normal risk that the class action may not be superior to individual adjudication. Any savings in judicial resources in this case is speculative . . . .

213 F.R.D. 607, 618 (S.D. Fla. 2003); see also Castano, 84 F.3d at 749 ("In the context of an immature tort, any savings in judicial resources is speculative, and any imagined savings

would be overwhelmed by the procedural problems that certification of a sui generis cause of action brings with it.").

None of our cases has ever held the "maturity" of a tort to be a proper consideration in the certification decision. Without delving into whether the plaintiffs' claims in this case are sufficiently new or innovative to count as an "immature" tort under the Osmose standard, we reject this as a legitimate consideration in making a "superiority" determination. There is no reason why, even with so-called "immature torts," district and circuit courts cannot make the necessary determinations under Rule 23 based on the pleadings and whatever evidence has been gathered through discovery. Moreover, there is no basis in Rule 23 for arbitrarily foreclosing plaintiffs from pursuing innovative theories through the vehicle of a class action lawsuit. Particularly when the considerations discussed at the beginning of this Section would preclude most plaintiffs from individually litigating their personal claims, a class action may be the only way that most people can have their rights—even "innovative" or "immature" rights—enforced. Furthermore, if an "immature tort" truly raises a variety of new or complicated legal questions, then those questions constitute significant common issues of law. Their resolution in a single class-action forum would greatly foster judicial efficiency and avoid unnecessary, repetitious litigation. For these reasons, it is desirable to litigate the plaintiffs' federal claims in a single forum.

B.

The final factor expressly specified in Rule 23(b)(3) that courts must weigh in deciding to certify a class action is whether certification will cause manageability problems. See Perez v. Metabolife Int'l, Inc., 218 F.R.D. 262, 273 (S.D. Fla. 2003) ("Severe manageability problems are a prime consideration that can defeat a claim of superiority."). This concern will rarely, if ever, be in itself sufficient to prevent certification of a class. "Courts are generally reluctant to deny

class certification based on speculative problems with case management." Managed Care Litig., 209 F.R.D. at 692. Even potentially severe management issues have been held insufficient to defeat class certification. See, e.g., Carnegie, 2002 U.S. Dist. LEXIS 21396, at *77 ("There is no question that this action, if certified, would present management difficulties. . . . [T]hose management issues, although substantial, do not counsel against certifying the class under Rule 23(b)(3)."); In re Thermagenics Corp. Sec. Litig., 205 F.R.D. 687, 697 (N.D. Ga. 2002) ("Certification cannot be denied because the number of potential class members makes the proceeding complex or difficult.").

In this case, the district court concluded that there were no "unsurmountable difficulties" with managing the case. Managed Care Litig., 209 F.R.D. at 696. While recognizing that "[r]eliance, causation and damages may create complications during the course of this litigation," the court found that "the potential difficulties are nowhere near the magnitude of problems that could arise from 600,000 separate actions." Id. at 696-97.

In reviewing this determination, we recall two points generally applicable throughout this "superiority" analysis. First, we are not assessing whether this class action will create significant management problems, but instead determining whether it will create relatively more management problems than any of the alternatives (including, most notably, 600,000 separate lawsuits by the class members). Second, where a court has already made a finding that common issues predominate over individualized issues, we would be hard pressed to conclude that a class action is less manageable than individual actions. See, e.g., Terazosin Litig., 220 F.R.D. at 700 (certifying class because "[m]ultiple lawsuits brought by thousands of consumers and third-party payers in seventeen different states would be costly, inefficient, and would burden the court system"); cf. Shelley, 2000

U.S. Dist. LEXIS 11429, at *28 ("[T]he complexity of the individual issues weighs further against manageability of the class action. Most if not all of the individual issues identified above would require extensive individualized examination of each class member.").

While each plaintiff must prove some individualized factual issues to support his RICO claim,

> [t]here are a number of management tools available to a district court to address any individualized damages issues that might arise in a class action, including: (1) bifurcating liability and damage trials with the same or different juries; (2) appointing a magistrate judge or special master to preside over individual damages proceedings; (3) decertifying the class after the liability trial and providing notice to class members concerning how they may proceed to prove damages; (4) creating subclasses; or (5) altering or amending the class.

In re Tri-State Crematory Litig., 215 F.R.D. 660, 699 n.28 (N.D. Ga. 2003) (quoting In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 141 (2d Cir. 2001)).

In light of these considerations, we hold that the district court acted well within its discretion in concluding that it would be better to handle this case as a class action instead of clogging the federal courts with innumerable individual suits litigating the same issues repeatedly. The defendants have failed to point to any specific management problems—aside from the obvious ones that are intrinsic in large class actions—that would render a class action impracticable in this case.

C.

Moving beyond the factors enumerated in Rule 23(b)(3), the defendants offer two additional reasons why a class action is inferior to a host of individual suits in resolving these disputes. First, they maintain that "a single jury, in a single

trial, should not decide the fate of the managed care industry." Opening Brief of Appellants Aetna, et al., at 45. Courts have occasionally found the impact that a class action suit could potentially have on an industry to be a persuasive reason to prohibit a class action from proceeding. In Rhone, for example, one of the reasons the Seventh Circuit granted a writ of mandamus ordering a district court to decertify a class was that, with a class action,

> [o]ne jury, consisting of six persons . . . will hold the fate of an industry in the palm of its hand. This jury . . . [may] hurl the industry into bankruptcy. . . . [This] need not be tolerated when the alternative exists of submitting an issue to multiple juries constituting in the aggregate a much larger and more diverse sample of decision-makers.

51 F.3d at 1300.

We find such reasoning unpersuasive and contrary to the ends of justice. This trial is not about the managed care industry; it is about whether several large HMOs conspired to systematically underpay doctors. The issue is not whether managed care is wrong, but whether particular managed care companies failed to live up to their agreements. The plaintiffs are seeking nothing more than the compensatory damages to which they are contractually entitled, and the treble damages to which they are statutorily entitled.

We have nothing but the defendants' conclusory, self-serving speculations to support their claim that this trial could devastate the managed care industry. "Because considering the financial impact of a judgment presupposes success on the merits and requires the trial court to express an opinion on the harshness Vel non of a particular remedy prior to trial itself, it ought to be allowed only in extreme cases." Roper, 578 F.2d at 1114. More importantly, however, if their fears are truly justified, the defendants can blame no one but themselves. It

would be unjust to allow corporations to engage in rampant and systematic wrongdoing, and then allow them to avoid a class action because the consequences of being held accountable for their misdeeds would be financially ruinous. We are courts of justice, and can give the defendants only that which they deserve; if they wish special favors such as protection from high—though deserved—verdicts, they must turn to Congress.

D.

Second, the defendants contend that a class action creates "unfair and coercive pressures on [them]" to settle that are unrelated to the merits of the plaintiffs' claims. They point to Castano, in which the Fifth Circuit decertified a class of cigarette smokers seeking to sue tobacco companies in part because

> [i]n the context of mass tort class actions, certification dramatically affects the stakes for defendants. Class certification magnifies and strengthens the number of unmeritorious claims. Aggregation of claims also makes it more likely that a defendant will be found liable and results in significantly higher damage awards. In addition to skewing trial outcomes, class certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low. These settlements have been referred to as judicial blackmail.

84 F.3d at 746 (citations omitted); accord Griffin v. GK Intelligent Sys., 196 F.R.D. 298, 305 (S.D. Tex. 2000).

The defendants also tear out of context quotes from Supreme Court cases. For example, they point out that the Supreme Court once observed that "[c]ertification of a large class may so increase the defendant's potential liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." Coopers &

Lybrand v. Livesay, 437 U.S. 463, 476, 98 S. Ct. 2454, 2462, 57 L. Ed. 2d 351 (1978). What the defendants conveniently omitted from their brief, however, is the fact that Livesay had nothing to do with the standards articulated in Rule 23(b)(3); it addressed only whether class certification decisions were immediately appealable prior to the enactment of Rule 23(f). See id. at 477, 98 S. Ct. at 2462 ("[T]he fact that an interlocutory order [denying class certification] may induce a party to abandon his claim before final judgment is not a sufficient reason for considering it a 'final decision' within the meaning of § 1291.").

Mere pressure to settle is not a sufficient reason for a court to avoid certifying an otherwise meritorious class action suit. See MasterMoney Antitrust Litig., 280 F.3d at 145 ("The effect of certification on parties' leverage in settlement negotiations is a fact of life for class action litigants. While the sheer size of the class in this case may enhance this effect, this alone cannot defeat an otherwise proper certification."); Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 295 (1st Cir. 2000) ("[N]o matter how strong the economic pressure to settle, a Rule 23(f) application, in order to succeed, also must demonstrate some significant weakness in the class certification decision.").

Indeed, settlement pressures have already been taken into account in the structure of Rule 23; such pressures were the main reason behind the enactment of Rule 23(f), which allowed the defendants to pursue this appeal in the first place. See id. at 148 ("One sound basis for granting jurisdiction under Rule 23(f) is . . . the circumstance that the class certification places inordinate or hydraulic pressure on defendants to settle, avoiding the risk, however small, of potentially ruinous liability.") (quotation marks and citation omitted); see, e.g., Isaacs v. Sprint Corp., 261 F.3d 679, 681 (7th Cir. 2001) ("If the order of certification stands, the pressure on [the defendant] to settle will be enormous. We

conclude that this is an appropriate case in which to accept a Rule 23(f) appeal and we proceed to the merits . . . ."). Having already used settlement pressure as a basis for getting into this court on interlocutory appeal, the defendants cannot continue to rely upon it as the basis for overturning the underlying certification ruling.

Moreover, while affirming certification may induce some defendants to settle, overturning certification may create similar "hydraulic" pressures on the plaintiffs, causing them to either settle or—more likely—abandon their claims altogether. See In re Diet Drugs Prod. Liab. Litig., 93 Fed. Appx. 345, 350 (3d Cir. 2004) ("Orders granting class certification may expose defendants to enormous liability while orders denying certification may effectively eviscerate the plaintiffs' ability to recover. In such cases, the pressure to settle that is imposed on the dissatisfied party may be grave and, effectively, unreviewable."); Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 165 (3d Cir. 2001) (holding that while "some of the securities claims pressed by the putative class members may be too small to survive as individual claims[,] . . . certifying the class may place unwarranted or hydraulic pressure to settle on defendants. Either way, an adverse certification decision will likely have a dispositive impact on the . . . litigation."). Because one of the parties will generally be disadvantaged regardless of how a court rules on certification, this factor should not be weighed.

V.

For the reasons articulated above, we affirm the district court's grants of class certification as to all RICO-related claims, though we urge it to reconsider the precise scope of the classes, and reverse the district court's grant of class certification as to all state-law claims other than the claim based on California law. We do not disturb the district court's

certification of the California Subclass because the defendants did not specifically challenge that on appeal.

Given the number of parties involved in this case, it threatens to degenerate into a Hobbesian war of all against all. Nevertheless, we feel that the district court—a veritable Leviathan—will be able to prevent the parties from regressing to a state of nature. One can only hope that, on remand, the proceedings will be short, though preferably not nasty and brutish.

SO ORDERED.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed October 6, 2004]

No. 02-16333-CC

LEONARD J. KLAY, M.D., CHARLES B. SHANE, M.D., ALL PLAINTIFFS, PRICE PLAIINTIFFS, PRICE, SESSA, KATZ & YINGLING, PROVIDER PLAINTIFFS, *ET AL.*,

Plaintiffs-Appellee,

versus

HUMANA, INC., HUMANA HEALTH PLAN, INC., FOUNDATION HEALTH SYSTEMS, INC., n.k.a. Health Net, Inc., PACIFICARE HEALTH SYSTEMS, INC., PACIFICARE OPERATIONS, INC., THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, UNITEDHEALTH GROUP, INC., f.k.a. United Healthcare Corporation, UNITEDHEALTH CARE, INC., WELLPOINT HEALTH NETWORKS, INC.,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Florida

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BEFORE: TJOFLAT, BIRCH and GOODWIN*, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appellants, PacifiCare Health Systems, Inc. and PacifiCare Operations, Inc. is DENIED.

Entered For The Court: s/ Gerald B. Tjoflat
United States Circuit Judge

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* Honorable Alfred T. Goodwin, United States Circuit Judge for the Ninth Circuit, sitting by designation.

APPENDIX D

UNITED STATES CODE ANNOTATED

FEDERAL RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS

IV. PARTIES

RULE 23. CLASS ACTIONS

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corre-

sponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determining by Order Whether to Certify a Class Action; Appointing Class Counsel; Notice and Membership in Class; Judgment; Multiple Classes and Subclasses.

(1)(A) When a person sues or is sued as a representative of a class, the court must--at an early practicable time--determine by order whether to certify the action as a class action.

(B) An order certifying a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) An order under Rule 23(c)(1) may be altered or amended before final judgment.

(2)(A) For any class certified under Rule 23(b)(1) or (2), the court may direct appropriate notice to the class.

(B) For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including

individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language:

- the nature of the action,
- the definition of the class certified,
- the class claims, issues, or defenses,
- that a class member may enter an appearance through counsel if the member so desires,
- that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and
- the binding effect of a class judgment on class members under Rule 23(c)(3).

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescrib-

ing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Settlement, Voluntary Dismissal, or Compromise.

(1)(A) The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.

(B) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

(C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

(2) The parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) must file a statement identifying any agreement made in

connection with the proposed settlement, voluntary dismissal, or compromise.

(3) In an action previously certified as a class action under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(4)(A) Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under Rule 23(e)(1)(A).

(B) An objection made under Rule 23(e)(4)(A) may be withdrawn only with the court's approval.

(f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) Appointing Class Counsel.

(A) Unless a statute provides otherwise, a court that certifies a class must appoint class counsel.

(B) An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.

(C) In appointing class counsel, the court

(i) must consider:

- the work counsel has done in identifying or investigating potential claims in the action,
- counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action,

- counsel's knowledge of the applicable law, and
- the resources counsel will commit to representing the class;

(ii) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(iii) may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs; and

(iv) may make further orders in connection with the appointment.

(2) Appointment Procedure.

(A) The court may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action.

(B) When there is one applicant for appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1)(B) and (C). If more than one adequate applicant seeks appointment as class counsel, the court must appoint the applicant best able to represent the interests of the class.

(C) The order appointing class counsel may include provisions about the award of attorney fees or nontaxable costs under Rule 23(h).

(h) Attorney Fees Award. In an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs authorized by law or by agreement of the parties as follows:

(1) Motion for Award of Attorney Fees. A claim for an award of attorney fees and nontaxable costs must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision, at a time set by the court. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) Objections to Motion. A class member, or a party from whom payment is sought, may object to the motion.

(3) Hearing and Findings. The court may hold a hearing and must find the facts and state its conclusions of law on the motion under Rule 52(a).

(4) Reference to Special Master or Magistrate Judge. The court may refer issues related to the amount of the award to a special master or to a magistrate judge as provided in Rule 54(d)(2)(D).

Fed. Rules Civ. Proc. Rule 23, 28 U.S.C.A., FRCP Rule 23

No. 04-522

Supreme Court, U.S.
FILED
DEC 15 2004
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IN THE

Supreme Court of the United States

UNITEDHEALTH GROUP, INC., f.k.a. United HealthCare Corporation, UNITEDHEALTHCARE, INC., HUMANA INC., HUMANA HEALTH PLAN, INC., FOUNDATION HEALTH SYSTEMS, INC., n.k.a. Health Net, Inc., PACIFICARE HEALTH SYSTEMS, INC., PACIFICARE OPERATIONS, INC., THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, WELLPOINT HEALTH NETWORKS INC.,

Petitioners,

v.

LEONARD J. KLAY, M.D., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

No. 04-522

UNITEDHEALTH GROUP, INC., f.k.a. United HealthCare Corporation, UNITEDHEALTHCARE, INC., HUMANA INC., HUMANA HEALTH PLAN, INC., FOUNDATION HEALTH SYSTEMS, INC., n.k.a. Health Net, Inc., PACIFICARE HEALTH SYSTEMS, INC., PACIFICARE OPERATIONS, INC., THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, WELLPOINT HEALTH NETWORKS INC.,

Petitioners,

v.

LEONARD J. KLAY, M.D., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ARGUMENT

The Eleventh Circuit's application of loose standards to affirm certification of a sprawling class that includes nearly every physician in the United States and claims involving tens of billions of physician-patient interactions has deepened the disagreement among the courts of appeals on two important and recurring questions. The Court should resolve the conflicts by granting the petition and confirming that (1)

Rule 23 requires courts to probe beyond the allegations of the complaint and rigorously analyze the evidence to ensure actual conformance with its certification standards and (2) Rule 23(b)(3)'s requirement that common issues must predominate cannot be met in a nonsecurities fraud case in which individual reliance is disputed.

I. IN CONFLICT WITH THOSE CIRCUITS THAT REQUIRE A SEARCHING REVIEW OF THE EVIDENTIARY RECORD, THE ELEVENTH CIRCUIT RELIED EXCLUSIVELY ON PLAINTIFFS' ALLEGATIONS.

This case squarely presents the important and recurring question whether the standard for certifying a class under FED. R. CIV. P. 23 requires a court to go beyond the pleadings and conduct a rigorous analysis of the evidentiary record. Respondents assert that the district court based its certification decision on evidence, BIO 14, but petitioners seek review of the Eleventh Circuit's decision, which adopted an approach to Rule 23 that excuses a district court from considering evidence.

The court of appeals made unmistakably clear that its commonality and predominance analysis turned solely on respondents' allegations of a common conspiracy involving uniform representations and reliance. The court expressly stated that, "in determining whether individual or collective issues predominate," it would consider only the "issues arising from the *allegations* contained in the complaint and the defenses raised against them." Pet. App. 56a n.7 (emphasis added). Consistent with that statement, the court addressed none of the evidence presented in the district court demonstrating that trial would involve numerous individualized issues concerning representation and reliance. Indeed, the court of appeals did not discuss the evidence at all. *See* Pet. App. 58a-59a, 62a-64a. The court of appeals further made its rejection of an evidentiary review explicit by its

distinction of *Simon* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 482 F.2d 880 (CA5 1973). *See* Pet. App. 62a (distinguishing *Simon*, in which the plaintiff failed "to *prove* any standardized representations," from this case based on what "plaintiffs *allege*" (emphasis added)). In glossing over the individualized issues that destroy the predominance of common issues, the court went so far as to recast respondents' allegations in the most generic terms possible: that "a variety of specific communications . . . all conveyed essentially the same message—that the defendants would honestly pay physicians the amounts to which they were entitled." *Id.*

Because the Eleventh Circuit's approach assumes away the difficulties with classwide treatment, this case presents the fundamental conflict between the circuits in stark relief. That core conflict arises from the divergent manner in which the circuits on each side of the split have reconciled the "rigorous analysis" mandated by *General Telephone Co. of the Southwest* v. *Falcon*, 457 U.S. 147, 161 (1982), with the Court's holding that district courts deciding class certification should not "conduct a preliminary inquiry into the merits of a suit." *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974). The Eleventh Circuit has now placed itself on the side of the split with those courts of appeals that perceive the "rigorous" Rule 23 analysis as involving no more than a careful (at best) review of the allegations in plaintiffs' pleadings. *See Caridad* v. *Metro-North Commuter R.R.*, 191 F.3d 283, 293 (CA2 1999) ("[A] weighing of the evidence [on commonality] is not appropriate at this stage in the litigation."); *J.B. ex rel. Hart* v. *Valdez*, 186 F.3d 1280, 1290 n.7 (CA10 1999) ("[W]hen deciding a motion for class certification, the district court should accept the allegations contained in the complaint as true."); *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 691 F.2d 1335, 1342 (CA9 1982) ("[I]n determining whether to

certify the class, the district court is bound to take the substantive allegations of the complaint as true.").[1]

Under the approach endorsed by the Second, Ninth, Tenth, and Eleventh Circuits, the Rule 23(b)(3) predominance inquiry becomes nothing more than a heightened pleading standard that plaintiffs can meet with artfully crafted allegations. In contrast and in conflict, the First, Third, Fourth, Fifth, and Seventh Circuits correctly hold that the required rigorous analysis includes a searching inquiry into the evidence as to whether the Rule 23 factors are satisfied. *E.g.*, *Tardiff* v. *Knox County*, 365 F.3d 1, 4-5 (CA1 2004) ("[I]n our view a court has the power to test disputed premises early on."); *Gariety* v. *Grant Thornton, LLP*, 368 F.3d 356, 365 (CA4 2004) ("*Eisen* . . . does not require a court to accept plaintiffs' pleadings when assessing whether a class should be certified."); *Sandwich Chef of Tex., Inc.* v. *Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 220 (CA5 2003) ("Going beyond the pleadings is necessary."); *Johnston* v. *HBO Film Mgmt., Inc.*, 265 F.3d 178, 189 (CA3 2001) (holding that it was "necessary[] for the district court to examine the factual record underlying plaintiffs' allegations in making its certification decision"); *Szabo* v. *Bridgeport*

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[1] Respondents erroneously suggest that the conflict analysis depends on "Second and Ninth Circuit cases that were decided before *Falcon*." BIO 10 n.7. In fact, *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation* was decided five months after *Falcon*, and the only pre-*Falcon* cases respondents identify were reaffirmed by their respective circuits in post-*Falcon* decisions. *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 691 F.2d, at 1342 (following *Blackie* v. *Barrack*, 524 F.2d 891, 901 n.7 (CA9 1975)); *compare Caridad*, 191 F.3d, at 293 (prohibiting weighing of the evidence regarding commonality), *with Shelter Realty Corp.* v. *Allied Maint. Corp.*, 574 F.2d 656, 661 n.15 (CA2 1978) ("[I]t is proper to accept the complaint allegations as true in a class certification motion."). Respondents do not even address the Second Circuit's post-*Falcon* holding in *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 135 (CA2 2001) (applying *Caridad*).

Machs., Inc., 249 F.3d 672, 677 (CA7 2001) (holding that "nothing . . . prevents the district court from looking beneath the surface of a complaint" to conduct the Rule 23 inquiries).

Respondents do not even attempt to reconcile those holdings with the Eleventh Circuit's misapplication of the rule in this case or the holdings of the other circuits on the Eleventh Circuit's side of the split.[2] Instead they deny, against all the accumulated precedent to the contrary, that a split exists at all. The courts of appeals themselves recognize what respondents refuse to—that the disagreement among the circuits on the Rule 23 standard is real and deep. *See Tardiff*, 365 F.3d, at 5 n.5.

To support their assessment of the precedents, respondents attempt to group the Eleventh Circuit with the First, Third, Fourth, Fifth, and Seventh Circuits—which advocate going behind the pleadings in a way the Eleventh Circuit in

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[2] The importance of the Court's attention to this issue is magnified by the virtually identical conflict among state courts, most of which look to federal decisional law as persuasive in applying state class action rules that are similar to federal Rule 23. *Compare, e.g.*, *Dragon* v. *Vanguard Indus.*, 89 P.3d 908, 912 (Kan. 2004) (rejecting the argument "that the trial court must accept the class allegations as true and not inquire into the merits of the class facts"); *Crow* v. *Citicorp Acceptance Co.*, 354 S.E.2d 459, 465 (N.C. 1987) (noting that, although "the plaintiffs properly alleged the existence of a class . . . the plaintiffs also will be required to demonstrate the actual existence of the class"); *Schwendeman* v. *USAA Cas. Ins. Co.*, 65 P.3d 1, 21 n.34 (Wash. Ct. App. 2003) ("[I]t is proper for the court to consider all the evidence in the record . . . relevant to the issue of whether the requirements of CR 23 were met."), *with, e.g.*, *Collins* v. *Anthem Health Plans, Inc.*, 836 A.2d 1124, 1134 (Conn. 2003) ("In determining whether to certify the class, a [trial] court is bound to take the substantive allegations of the complaint as true." (alteration in original)); *Philip Morris Inc.* v. *Angeletti*, 752 A.2d 200, 220 (Md. 2000) ("A court should accept the putative class representative plaintiffs' allegations as true in making its decision on class certification."); *Delgozzo* v. *Kenny*, 628 A.2d 1080, 1086 (N.J. Super. Ct. App. Div. 1993) ("The court is bound to take the substantive allegations of the complaint as true.").

this case plainly did not—by citing *earlier* Eleventh Circuit decisions and ignoring that court's emphatic movement in this case to an approach that accepts class proponents' pleadings at face value. That attempt fails. Respondents rely on *Rutstein* v. *Avis Rent-A-Car Systems, Inc.*, 211 F.3d 1228 (CA11 2000), and *Love* v. *Turlington*, 733 F.2d 1562 (CA11 1984), both of which predate (*Love* by twenty years) the Eleventh Circuit's Rule 23 analysis in this case. To the extent, if any, *Rutstein* and *Love* accord with the jurisprudence of those circuits that require an inquiry beyond the pleadings, the Eleventh Circuit has now departed from that precedent.[3] The court of appeals expressly distinguished this case from *Rutstein*. Pet. App. 60a-61a. Indeed, *Rutstein* followed *Castano* v. *American Tobacco Co.*, 84 F.3d 734 (CA5 1996), *see Rutstein*, 211 F.3d, at 1234, which the court of appeals, at least in part, expressly repudiated. Pet. App. 62a.

II. THE ELEVENTH CIRCUIT IS IN CONFLICT WITH THOSE CIRCUITS HOLDING THAT FRAUD CLAIMS IN WHICH INDIVIDUAL RELIANCE IS IN DISPUTE ARE NOT SUITABLE FOR CLASS TREATMENT.

This case also presents the ripe split over whether nonsecurities fraud cases in which individual reliance is at issue are suitable for class treatment. The court of appeals correctly recognized that each plaintiff in respondents' putative fraud class must demonstrate individual, actual reliance on the alleged representations, Pet. App. 61a, yet incongruously suggested that this "individual" reliance could be inferred on a classwide basis from a representation that the court redefined to be uniform. The court of appeals extrapolated from *Kirkpatrick* v. *J.C. Bradford & Co.*, 827 F.2d 718 (CA11 1987), in which the Eleventh Circuit

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[3] Respondents' own statistics suggest that, at least since 2002, the Eleventh Circuit has been more likely to uphold class certifications than it was previously. *See* BIO 16.

previously limited a presumption of reliance to claims that "a security could not have been issued but for a fraudulent scheme," *id.*, at 723, to expansively conclude that "circumstantial evidence" "could lead a reasonable factfinder to conclude . . . that each individual plaintiff relied on the defendants' representations." Pet. App. 63a.

But the predominance analysis must reach both the claims and defenses, and a plaintiff's asserted ability to prove reliance by circumstantial evidence cannot overcome a defendant's due process right to negate the inference of reliance with respect to individual class members. *Cf. Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 620 (1997) (explaining that Rule 23 must be applied in a manner "properly tuned to the instruction that rules of procedure 'shall not abridge . . . any substantive right'"). If the jury in this case will be permitted to infer, from the allegedly uniform representations, that each of the approximately 600,000 physicians in the class individually relied on the alleged representations with respect to each of the tens of billions of transactions at issue, then petitioners must be afforded the right to rebut that inference by presenting evidence of nonreliance with respect to each of those individual class members. *See id.*, at 623 & n.18 (noting the relevance to the Rule 23 inquiry of available substantive defenses); *Sandwich Chef*, 319 F.3d, at 220 ("Defendants are entitled to attempt to undercut this proof [of reliance] with evidence."). As illustrated by the testimony of the named plaintiffs disavowing their individual reliance, a classwide inference of reliance can be rebutted by individualized proof. *See* Pet. 7 (collecting record citations); *cf. Sandwich Chef*, 319 F.3d, at 216 & n.7 (holding that individual issues predominated based, in part, on defendants' evidence demonstrating lack of reliance on alleged misrepresentations). There has been no demonstration that similar inquiries can be manageably conducted with regard to each of the more than half a million class members in a way that protects

petitioners' substantive rights to defend against respondents' fraud claims, and, even if they could be managed, those individualized inquiries would necessarily predominate over any common issues that might exist.

The Eleventh Circuit has thus placed itself on the wrong side of the clear split between circuits that permit classwide determinations when individualized issues of reliance are in dispute (including the Third, Seventh, and Ninth) and those recognizing that, when individualized reliance issues are in dispute, those inquiries will necessarily predominate in any fraud claim (the Second, Fourth, Fifth, Sixth, and Eight Circuits). *Compare, e.g.*, *Gunnells* v. *Healthplan Servs., Inc.*, 348 F.3d 417, 434-38 (CA4 2003) (holding that, in a nonsecurities-fraud case, in which no presumption was available, a class action "simply [could not] satisfy Rule 23's predominance and commonality requirements"); *Sandwich Chef*, 319 F.3d, at 211 ("Fraud actions that require proof of individual reliance cannot be certified as . . . class actions."); *Moore* v. *PaineWebber, Inc.*, 306 F.3d 1247, 1253 (CA2 2002) (holding that fraud claims based on individualized representations are not appropriate subjects for class certification); *Stout* v. *J.D. Byrider*, 228 F.3d 709, 718 (CA6 2000); *Castano*, 84 F.3d, at 745; *Jensen* v. *SIPCO, Inc.*, 38 F.3d 945, 953 (CA8 1994), *with, e.g.*, *Poulos* v. *Caesars World, Inc.*, 379 F.3d 654, 668 (CA9 2004) (indicating that reliance can, in some nonsecurities-fraud cases, be proved on a classwide basis by circumstantial evidence); *Carnegie* v. *Household Int'l, Inc.*, 376 F.3d 656, 663 (CA7 2004) (expressing disagreement with *Sandwich Chef*), *pet. for cert. filed*, 73 U.S.L.W. 3259 (Oct. 14, 2004) (No. 04-518); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 315 (CA3 1998) (explaining that "the presence of individual [reliance] questions does not *per se* rule out a finding of predominance").

Respondents' assertion that the court of appeals followed the same rule applied by the Fifth Circuit in *Castano*, BIO 19

& n.13, simply ignores the court of appeals's frank acknowledgement that it was consciously diverging from the Fifth Circuit on whether predominance can ever be satisfied when individual reliance is at issue. The court of appeals expressly disagreed with the Fifth Circuit's holding in *Castano* that "a fraud class action cannot be certified when individual reliance will be an issue," calling it "a misinterpretation of *Simon*." Pet. App. 62a. The deepening of the rift between the circuits caused by the court of appeals's holding in this case is both real and deliberate.

III. The Court Should Resolve These Conflicts by Requiring a Genuinely Rigorous Analysis of the Evidence and Whether Classwide Inferences Compromise Substantive Rights.

The Court should restore uniformity to class-certification decisions by resolving the conflicts and clarifying that Rule 23 requires a rigorous analysis going beyond the pleadings to determine if class proponents can demonstrate actual conformance with its requirements and that individualized reliance issues that are genuinely in dispute make classwide determinations unfeasible and improper. To avoid the significant social costs of imprudent class certifications—including inordinate pressure to settle unmeritorious claims—the courts of appeals for all circuits must require district courts to apply a class-certification analysis with teeth. The importance of the Court's resolving the conflicts is underscored by the interest expressed by *amici curiae* the Blue Cross and Blue Shield Association, the Chamber of Commerce of the United States, and Exxon Mobil Corporation. The Court should disapprove the precedent of those courts of appeals that permit class-action proponents to circumvent actual conformance with Rule 23 through artful pleading and unjustifiable presumptions.

CONCLUSION

The court of appeals's decision in this case raises two important and related issues under Rule 23 on which the courts of appeals are sharply divided. The Court should grant the petition for a writ of certiorari and resolve those disagreements among the courts of appeals by reversing the class certification in this case.

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Supreme Court of the United States

UNITEDHEALTH GROUP, INC. F/K/A
UNITED HEALTHCARE CORPORATION, ET AL.,
Petitioners,

v.

LEONARD J. KLAY, M.D., ET AL.,
Respondents.

On Petition for Writ of Certiorari to the Court of Appeals for the Eleventh Circuit

BRIEF FOR BLUE CROSS AND BLUE SHIELD ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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INTEREST OF THE AMICUS CURIAE

The Blue Cross and Blue Shield Association ("BCBSA") is the national association of Blue Cross and Blue Shield companies. It comprises 40 independent, locally owned Blue Cross and Blue Shield Plans. The Blue Cross and Blue Shield companies, through relationships with employers, employee benefits plans, and individual subscribers furnish health care coverage to over 91 million Americans.[1]

The Petition for a Writ of Certiorari in this case presents questions concerning the legal standards for certifying class actions under Fed. R. Civ. P. 23. It does so in the context of a massive class action pending in the United States District Court for the Southern District of Florida brought on behalf of hundreds of thousands of healthcare providers against the country's largest managed care entities. Similar putative class actions are pending against BCBSA and the Blue Cross and Blue Shield companies in the same court. Because the approach adopted by the Court of Appeals in this case potentially impacts BCBSA and its members in the litigation pending against them, BCBSA has an interest in the Petition.

Counsel for the parties have filed letters with the Clerk of the Court consenting, in global manner, to the filing of all *amicus* briefs supporting either side in this action.

SUMMARY OF ARGUMENT

The Court of Appeals's decision will have national implications for the healthcare industry. This suit is just one of innumerable actions brought by providers against health insurers that, as a result of action by the Judicial Panel on Multidistrict Litigation ("MDL Panel"), are

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[1] In accordance with Rule 37.6, BCBSA certifies that counsel for a party did not author this brief in whole or in part and that no entity other than BCBSA, its members, or its counsel made a monetary contribution to the preparation or submission of the brief.

currently pending in the same District Court in this Circuit. In these many actions, providers seek to restructure the health insurance industry suitable to their interests. Given the scope of the allegations, the classes that the providers seek to have certified, and the defendants they have named, the cases potentially affect nearly every provider in the nation (both physician and non-physician), almost every major insurer, and the tens of millions of Americans who are those insurers' subscribers.

The class certification decision alone may accomplish the providers' ends. That is because, as this Court and others have readily recognized, a class certification determination in high stakes litigation places heavy pressure on defendants to settle rather than risk financial ruin, even when the claims have no merit. Yet, had this case proceeded in a different Circuit – indeed, in one of the other District Courts the MDL Panel had as an option for the initial transfers – it might never have been certified as a class action, due to the severe split in the Circuits on the issues raised in the Petition. If the entire healthcare industry is to be drastically altered, it should not be as a consequence of which Circuit determined the class certification issue. The Court should grant the Petition to ensure that any such restructuring would result from a certification decision that is correct, not from the forum selection for the actions.

ARGUMENT

THE COURT OF APPEALS'S DECISION HAS NATIONAL IMPLICATIONS FOR A CRITICAL INDUSTRY

The Court of Appeals described this action as potentially "all against all." *Klay v. Humana, Inc.*, 382 F.3d 1241, 1276 (11th Cir. 2004). With the certification of the class, the suit pits, on the one side, the nation's physicians against, on the other side, most of the country's

major managed care entities. Furthermore, because the physicians seek large-scale retroactive and prospective increases in the amount of reimbursement to them from the managed care companies, the action could potentially affect every subscriber of those companies as well. Increases in the reimbursement amount for every treating physician inevitably will increase the cost of health insurance for subscribers. Even more directly, coinsurance obligations of subscribers oftentimes are a percentage based on the overall payment allowance that their insurer establishes for the provider, meaning that any subscriber coinsurance obligations may increase as the payment level to providers increases. *See Pascack Valley Hosp., Inc. v. Local 464A UFCW Welfare Reimbursement Plan*, No. 03-4196, U.S. App. LEXIS 22632, at *25-*27 (3d Cir. Nov. 1, 2004) (noting impact of provider claims on subscribers); *Everson v. Blue Cross & Blue Shield of Ohio*, 898 F. Supp. 532, 543-44 (N.D. Ohio 1994) (discussing the effect of provider reimbursement levels on subscribers' coinsurance).

Overall, the Court of Appeals indicated that the case could involve a class of 600,000 physicians. *See* 382 F.3d at 1273. And it has elsewhere been estimated that the suit affects insurers and subscribers encompassing "about half the nation's managed care market." *HMOs*, Miami Daily Business Review, Sept. 11, 2003, Vol. 3, No. 9-11, at 8.

And that is just half the picture. This case is only the earliest action among many putative federal class actions brought by providers against health insurance entities, all of which are now pending before the U.S. District Court for the Southern District of Florida. The MDL Panel has transferred nearly 100 separate actions involving providers against health insurers to this particular District Court. *See, e.g., In re Humana Inc. Managed Care Litig.*, No. 1334, 2000 U.S. Dist. LEXIS 5099 (J.P.M.L. Apr. 13, 2000); *In re Humana Inc. Managed Care Litig.*, No. 1334, 2000 U.S. Dist. LEXIS 15927 (J.P.M.L. Oct. 23, 2000); *In re*

Managed Care Litig., 246 F. Supp 2d 1363 (J.P.M.L. 2003); *see also* Judicial Panel on Multidistrict Litigation, Statistical Analysis of Multidistrict Litigation 2004, Index to Transferee Districts with Multidistrict Litig., at 17 (at http://www.jpml.uscourts.gov/StatisticalAnalysis2004.pdf).

Also among the pending actions are two suits against BCBSA and local Blue Cross and Blue Shield Plans, one brought by physician providers and the other by non-physician providers including chiropractors, podiatrists, optometrists, opticians, social workers, nurse practitioners, and acupuncturists. *Thomas v. Blue Cross & Blue Shield Ass'n*, No. 03-21296-CIV-MORENO/KLEIN (S.D. Fla.); *Solomon v. Blue Cross & Blue Shield Assn'n*, No. 03-22935-CIV-MORENO/KLEIN (S.D. Fla.). If these suits are certified as class actions in the manner proposed by the suing providers, and given the breadth of the provider networks that the Blue Cross and Blue Shield entities have created, the class of plaintiff physicians here may likewise number in the hundreds of thousands; and any class of non-physician practitioners, if certified as these providers seek, possibly might be as numerous. Moreover, because the Blue Cross and Blue Shield companies provide health benefits and insurance to more than 91 million individuals, the segment of the general population that potentially may be affected by the two suits against the Blue Cross and Blue Shield entities is very large.

As a result of all of these suits and the MDL Panel's decisions, nearly the entire healthcare industry is enmeshed in litigation in a single District Court: namely, all of the major companies that provide health benefits and insurance and most of the nation's providers, with the effects of the cases conceivably spilling over to almost the whole insured population of the country. Because the suits seek review of claims payments going back as far as 1990, *see Klay*, 382 F.3d at 1250, and request, as damages, additional amounts that providers allegedly should have received in those

payments, the number of transactions that the providers attempt to place in issue could be staggering. The injunctive relief sought in the actions – *i.e.*, the alteration of claims processing practices for future claims for payment – places at risk potentially all future claims payment transactions.

A decision to certify a class in these actions has the potential to remake this critical industry. Indeed, that reportedly was the litigation's objective from the start. *See, e.g.*, Beverly Kraft, *Scruggs Eyes Massive HMO Lawsuit*, The Clarion-Ledger (Jackson, MS), July 10, 2000, at 1B; *Pascagoula Attorney Plans Massive Lawsuit Against HMOs*, Associated Press State & Local Wire, July 10, 2000 [hereinafter "Associated Press Report"]; Mike Cleary, *Lawyer Files Suits Against 5 HMOs*, Washington Times, Nov. 25, 1999, at B8; *see also* Susan Beck, *HMO Postmortem*, The American Lawyer, Oct. 13, 2003. Certainly, Respondents' allegations are aimed at challenging fundamental aspects of the health insurance business, including the procedure codes used when processing claims, the timing for making payments, and the manner in which insurers create provider networks. *See Klay*, 382 F.3d at 1252-53.

The certification decision alone may lead to the restructuring Respondents seek because of the now well-recognized dynamic that certification creates. As this Court has stated: "[C]ertification of a large class may so increase the defendant's potential liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *accord Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("In the context of mass tort class actions, certification dramatically affects the stakes for defendants."); *see also* Associated Press Report (reporting that attorney in original companion case to Respondents' action stated: "My strategy has

always been to raise the stakes as high as possible. It puts incredible pressure on everyone to settle it.").

The practical reality is that, in this litigation, the certification of a class places heavy pressure on Petitioners to accede to some of Respondents' demands and settle, rather than "roll the dice" and possibly incur "potentially crippling, even bankrupting" damages awards. Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1254 (2002). Two defendants – Aetna Health Inc. and CIGNA HealthCare – have already settled with Respondents, agreeing to substantial changes in the manner in which they do business. *See In re Managed Care Litig.: Class Plaintiffs v. Aetna Inc.*, No. 00-1334-MD-MORENO, Final Approval Order and Judgment (Oct. 24, 2003) (approving Aetna settlement); *In re Managed Care Litig.: Shane v. Humana, Inc.*, No. 00-1334-MD-MORENO, Order Approving Settlement Among CIGNA Healthcare and Physicians, Certifying Class, and Directing Final Judgment (Feb. 2, 2004).

If the industry is to be remade on a national scale, it should not be on the back of a Court of Appeals decision that conflicts with the decisions of sister circuits. For instance, as the Petition explains, it cannot be disputed that, had this action proceeded in a court in the Fifth Circuit, no class could have been certified, in light of that Circuit's ruling that "a fraud class action cannot be certified when individual reliance will be an issue." *Castano*, 84 F.3d at 745; *accord Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 211 (5th Cir. 2001), *cert. denied*, 540 U.S. 819 (2003). The irony is that one of the original actions commenced by Respondents and at issue in the MDL Panel's first order was a case filed in the U.S. District Court for the Southern District of Mississippi – in the Fifth Circuit. *See In re Humana Inc. Managed Care Litig.*, 2000 U.S. Dist. LEXIS 5099, at *1. Had the MDL

Panel chosen a Mississippi venue, rather than a Florida venue, for the transferred actions, the physician class would not have been certified.

The Court should grant the Petition to ensure that, if this industry is to undergo significant alteration at the behest of litigation, it does so only as a consequence of a correct class certification decision, not as a result of the forum the MDL Panel chose. The Petition presents important questions of class action procedure on which the Circuits are in conflict; the prospect that one Circuit's view of the law will have immediate nationwide import – as the Court of Appeals's decision here would have – makes even more compelling the case for granting the Petition.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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UNITEDHEALTH GROUP, INC., *et al.*,

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LEONARD J. KLAY, M.D., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Eleventh Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

Representing an underlying membership of more than three million companies and professional organizations of all sizes and in all industries, the Chamber of Commerce of the United States ("the Chamber") is the world's largest business federation. The Chamber advocates the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

The Chamber's members are frequently the target of class action litigation. Although class actions can be useful devices, they are readily prone to abuses that pose significant risks to the business community and to the nation's economy. Class certification greatly increases the burdens of litigation, including the risk of an adverse verdict, and thus often forces defendants to settle cases even if they lack merit. Such settlements – aptly described by Judge Friendly's term "blackmail settlements" – distort the legal system and cause substantial economic harm. Settlements coerced by questionable or erroneous certification decisions impose substantial costs on businesses that are often passed on to consumers; they deter innovation; and they cause inefficiency in the capital markets. Application of the proper standards for class certification under Rule 23 of the Federal Rules of Civil Procedure is an issue of surpassing importance to the Chamber and its members. *Amicus* has extensive experience litigating these issues and is well situated

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[1] The parties' letters of consent to this filing of this brief have been lodged with the Clerk. Pursuant to Rule 37.6 of the Rules of this Court, the Chamber states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

to brief this Court on their importance, which extends well beyond the immediate concerns of the parties.

INTRODUCTION AND SUMMARY OF ARGUMENT

"[C]lass actions are without doubt the most controversial subject in the civil process today." Bruce Hay & David Rosenberg, "*Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377, 1377 (2000). Much of the controversy centers on class certification, which can transform a modest set of individual claims into a gargantuan lawsuit that threatens an entire company (or, as in this case, an entire industry) with ruinous financial liability. From a defendant's perspective, certification dramatically increases both the costs of litigation and the costs of an adverse verdict. It also increases the *likelihood* of an adverse verdict, because class actions create additional procedural burdens for defendants that make such cases more difficult to defend.

For these reasons, judges and academic commentators have recognized that class certification "places inordinate or hydraulic pressure on defendants to settle." *Newton* v. *Merrill Lynch*, 259 F.3d 154, 164 (3d Cir. 2001); see also Robert Bone & David Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1292 (2002) ("[A]lmost all class actions settle, and the class obtains substantial settlement leverage from a favorable certification decision."). The settlement pressures created by certification decisions apply even for claims that lack merit. *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978) ("[C]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and abandon a meritorious defense.").

Against this backdrop, few legal questions are of greater concern to the business community than the one presented in this case: whether a federal court is required, before certifying a class action, to conduct a rigorous analysis that goes beyond the bare allegations of the complaint, in order to determine

whether the class certification is *in fact* appropriate under the standards of Rule 23. That issue recurs in case after case; indeed, the persistent and deepening circuit split regarding the standard imposed by Rule 23 of the Federal Rules of Civil Procedure is a continuing source of frustration and dismay for class action defendants. The division in the lower courts springs from a misreading of this Court's prior decisions that has generated confusion for decades. The consequences have been forum shopping and abuse of the class action mechanism to coerce lucrative settlements in cases of dubious validity. The present case provides an excellent opportunity to end those abuses and bring much-needed clarity and uniformity to the application of Rule 23.

I. The approach followed by the court of appeals in this case makes class certification all but automatic. It allows plaintiffs to secure certification merely by artfully drafting a complaint, rather than demonstrating to the district court that the prerequisites of Rule 23 actually exist. Such abdication of judicial responsibilities is inconsistent with this Court's instruction that "rigorous analysis" of certification issues is required by Rule 23, but many courts have mistakenly concluded that the analysis must be based on plaintiffs' *allegations*, rather than judicial *findings*, because of this Court's admonition that class certification decisions should not be based on a preliminary examination of the merits. Many of the worst abuses in contemporary class action litigation arise because Rule 23 is treated merely as a pleading requirement.

II. Class certification fundamentally changes the nature of a case and gives plaintiffs enormous leverage over defendants. Certifying a class without looking beyond the allegations of the complaint leads to erroneous certification decisions that greatly benefit class counsel at the expense of defendants and absent class members. Such a cavalier approach confers the benefits of class certification without meaningful judicial scrutiny of even the most outlandish and implausible allegations. It encourages vexatious class action litigation that burdens the

judicial system and imposes substantial economic costs on defendants – all to the ultimate detriment of U.S. companies and consumers.

III. The petition should be granted, even though it seeks interlocutory relief. In authorizing interlocutory appellate review of certification decisions, FED. R. CIV. P. 23(f) recognizes that class certification by a district court fundamentally alters the nature of a case and greatly reduces the likelihood of a final, appealable judgment. Without interlocutory review, certification decisions of the sort made in this case are likely to escape this Court's review altogether.

The Court should take this opportunity to make clear that certification decisions require an analytic rigor commensurate with their effects on the parties to a particular case and on the legal system more generally. The issue is too important – and the costs of getting it wrong too great – to allow this widening circuit split to linger any longer.

ARGUMENT

The proper application of Rule 23's requirements for class certification is an issue of unarguable significance that arises in nearly every case filed as a class action. This Court has yet to address the issue squarely, but has instead allowed an increasingly deep and obvious circuit split to develop. Because that split is effectively described in the petition, *amicus* will concentrate on the very real – and very serious – consequences of the split; why the approach taken by the Eleventh Circuit (and those other courts in whose wake it traveled) is so profoundly misguided; and why it is immediately imperative for this Court to address these problems and ensure national uniformity in the application of Rule 23.

I. CERTIFYING A CLASS BASED ONLY ON THE PLAINTIFFS' ALLEGATIONS "HAS NOTHING TO RECOMMEND IT" AND LEADS TO ERRONEOUS CLASS CERTIFICATIONS

The court of appeals in this case affirmed class certification – including the critical "finding" that common issues would predominate over individual issues – based on nothing more than plaintiffs' *allegations*. The Eleventh Circuit ignored the extensive evidence in the record that the defendants' representations to the members of the purported class were not uniform and that the nature and that the extent of reliance (if any) on those representations varied considerably among class members.[2] Rule 23 does not require this evidence to be believed, but

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[2] As the petition for a writ of certiorari accurately observes, two distinct circuit splits have developed – one concerning whether the court conducting a Rule 23 inquiry should accept the plaintiffs' allegations as true, the other concerning the ability to find that the predominance requirement is met when each plaintiff's case depends on a showing of reliance – that are both implicated by the decision below. On the second question, the court of appeals expressly rejected the Fifth Circuit's holding in *Castano* v. *Am. Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996) that "a fraud class action cannot be certified when individual reliance will be an issue." *Castano* recognizes, correctly in the Chamber's view, that class certification is almost invariably inappropriate when plaintiffs must prove reliance individually. The Eleventh Circuit disagreed, however, holding that individual reliance was no barrier to certification. Pet. App. 62a-64a. Because this important conflict is worthy of the Court's attention, the Chamber fully supports a grant of certiorari on both questions presented. The Chamber devotes this brief entirely (other than this footnote) to the first question presented, however, because "[t]he court of appeals's refusal to recognize that individual issues always predominate in a fraud case in which reliance is disputed *is a product of* its failure to look beyond the plaintiffs' allegations and apply the rigorous analysis that Rule 23 requires." Pet. 25 (emphasis added). That is, the Eleventh Circuit gave the wrong answer to the second question presented – relaxing the requirement for proving reliance and suggesting that plain-

it does require the evidence to be *considered*. The court of appeals, however, affirmed the class certification based only on an inquiry into whether the allegations in the complaint supported the requisite "predominance" finding. This cramped analysis permitted a class certification based on generalized characterizations of the defendants' representations and plaintiffs' reliance – for example, that defendants promised to "honestly pay physicians the amounts to which they were entitled," Pet. App. 62a – rather than a careful analysis of whether, *in fact*, common issues would predominate in the case.

In so doing, the court of appeals aligned itself with a minority of circuits that have held that, "when deciding a motion for class certification, the district court should accept the allegations contained in the complaint as true." *J.B. ex rel. Hart* v. *Valdez*, 186 F.3d 1280, 1290 n.7 (10th Cir.1997). As the Seventh Circuit has observed, however, that approach "cannot be found in Rule 23 and has nothing to recommend it." *Szabo* v. *Bridgeport Machines, Inc.*, 249 F.3d 672, 676 (7th Cir. 2001). Indeed, relying solely on the plaintiffs' allegations bespeaks a fundamental misunderstanding both of Rule 23 and of class certification, one that poses severe consequences for defendants, for absent class members, and for the legal system generally.

The problems with this approach begin with the text of Rule 23, which mandates that a class may be certified only if the district court "*finds* that questions of law or fact common to the members of the class predominate over any questions affecting only individual members." FED. R. CIV. P. 23(b)(3) (emphasis added). Deference to bare allegations, particularly when those allegations gloss over critical facts that undermine commonality or when the allegations are contradicted by evidence in the record, cannot substitute for the "findings" required by the rule.

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tiffs could satisfy that element by means of "common evidence" (Pet. App. 64a) – precisely because it had already given the wrong answer to the first question.

See *Gariety* v. *Grant Thornton, LLP*, 368 F.3d 356, 365 (4th Cir. 2004).

This is confirmed by the 2003 Amendment to Rule 23(c)(1)(A), which directed that class certification be resolved "at an early practicable time" rather than "as soon as practicable," as the earlier version of the rule required. The rule was amended in recognition of the fact that it is often "appropriate to conduct controlled discovery into the 'merits,' limited to those aspects relevant to making the certification decision on an informed basis." FED. R. CIV. P. 23 advisory committee's notes. This provision makes clear that class certification should rest on facts, not mere allegations; it requires careful analysis of the actual circumstances of the case, rather than a cursory reading of the complaint. To make the necessary findings, in other words, requires active engagement with the evidence and the legal issues in the case to determine whether the claims can indeed be fairly and effectively tried on a classwide basis. When that determination cannot be reached solely on the basis of the complaint, as is almost invariably the case, the court must engage in fact-finding based on evidence presented by the parties.

This much should have been clear from *General Telephone Company of the Southwest* v. *Falcon*, 457 U.S. 147 (1982). In *Falcon*, an employment discrimination case, the Court affirmed the reversal of a certification decision, faulting the district court for failing to "evaluate carefully the legitimacy of the named plaintiff's plea" that he was a proper class representative under Rule 23(a). *Id.* at 160. Emphasizing that "actual, not presumed, conformance with Rule 23(a) remains indispensable," the Court specifically observed that it will often be "necessary for the [district] court to probe behind the pleadings before coming to rest on the certification question." *Ibid.* Thus, whereas the Eleventh Circuit's decision here suggests that class certification decisions may merely test the sufficiency of plaintiffs' allegations – akin to a motion under Rule 12(b)(6) – *Falcon* says the contrary. It illustrates that Rule 23 does more than impose a

pleading requirement. The certification procedure described by the rule is instead meant to ensure that defendants and absent class members are not subjected to the potential prejudice that inheres in an improper class certification, by demanding a "rigorous analysis" sufficient to show that the certification is appropriate. *Id.* at 161. As one commentator has aptly observed, "[i]t is hard to imagine how one could conduct a 'rigorous analysis' if evidence related to the merits cannot be considered specifically for the purpose of assessing whether plaintiffs have met the Rule 23 requirements." David S. Evans, *Class Certification, The Merits, And Expert Evidence*, 11 GEO. MASON L. REV. 1, 10 (2002).

The fallacy of the Eleventh Circuit's approach is highlighted by considering what would happen if it were applied in the context of the Rule 23(a) factors. For example, could plaintiffs satisfy the numerosity requirement of Rule 23(a)(1) simply by *alleging* that the putative class was sufficiently large to render joinder impracticable? As the Seventh Circuit has observed, there would be no justification for a district court to defer to such an allegation in the face of evidence that the class had only two members. *Szabo*, 249 F.3d at 676. Similarly, if a defendant put forward evidence that the named plaintiffs had interests adverse to those of the class, see FED. R. CIV. P. 23(a)(4), the district court surely could not certify the class based merely on contrary allegations in the complaint. In order to protect absent class members and the court itself, that issue would have to be squarely confronted and decided – based on the facts as they are, not as plaintiffs wish them to be. And there is simply no reason why the certification procedure should be any different where (as here) the dispute centers on the predominance requirement of Rule 23(b)(3).

The courts that have suggested otherwise have done so largely because of a misreading of *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974). *Eisen* involved claims brought by approximately 6 million odd-lot traders on the New York Stock Exchange alleging violations of the antitrust and securi-

ties laws. The district court, concerned about the costs of notifying all prospective class members, conducted a preliminary inquiry into the merits of the suit. After concluding that plaintiffs had a strong case, the judge allocated 90 percent of the notice costs to the defendants. The Second Circuit reversed, and this Court affirmed the Second Circuit. In so doing, the Court observed that a district court should not "conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Id.* at 177. In context, this statement is perfectly sensible; class certification decisions must turn on whether the elements of Rule 23 are satisfied, not whether the plaintiffs have a strong case on the merits.[3]

Since it was decided, however, *Eisen* has been cited frequently as supporting a rule that allows district courts at the certification stage to ignore any evidence that might bear on the merits – even when considering such evidence is necessary to determine whether the prerequisites of Rule 23 actually exist in a particular case. See Bone & Evans, *supra*, 51 DUKE L.J. at 1266 ("*Eisen* * * * has produced a large body of case law in which lower court judges stop short of making the sort of merits inquiry required for a sound certification analysis."). This approach has led courts to certify classes based on an unquestioning acceptance of the allegations in the plaintiffs' complaint. *E.g.*, *Shelter Realty Corp.* v. *Allied Maintenance Corp.*, 574 F.2d 656, 661 n.15 (2d Cir. 1978). Despite *Falcon*, this misreading of *Eisen* has persisted and has seriously distorted the law of class actions for decades. See Evans, *supra*, 11 GEO. MASON L. REV. at 8-9 ("Many district court have misread *Eisen* as saying that anything that smacks of merits is off limits in

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[3] Indeed, in support of its conclusion, the Court approvingly cited Judge Wisdom: "In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Eisen*, 417 U.S. at 178 (quoting *Miller* v. *Mackey Int'l*, 452 F.2d 424, 427 (5th Cir. 1971)).

considering the class issues."). The time has come for the Court to correct that long-standing error.

This distortion of *Eisen* demands correction not merely because it is wrong, but because it is dangerous. It makes class certification far too easy. As the Fourth Circuit has observed, if "it were appropriate for a court simply to accept the allegations of a complaint at face value in making class action findings, every complaint asserting the requirements of Rule 23(a) and (b) would automatically lead to a certification order." *Gariety*, 368 F.3d at 365. It is difficult to imagine a case in which a well-represented class would not be certified because certification could be secured simply by artful drafting of the complaint.

District courts are supposed to act as guardians of the rights of defendants and absent class members, and as protectors of the interests of the judicial system itself, by making the "findings" required by Rule 23 after performing the "rigorous analysis" required by *Falcon*. But courts that rely solely on plaintiffs' allegations are instead turned into little more than rubber stamps, whose task is merely to ensure that the complaint includes the requisite magic words. This "moves the court's discretion to the plaintiff's attorneys," allowing them to manipulate the certification process to their own ends. *Szabo*, 249 F.3d at 677. As a result, many cases in which class treatment is grossly inappropriate – cases, like this one, in which it is manifest that individual issues predominate over common issues – are nonetheless certified and proceed toward trial as class actions. Defendants, absent class members, and the courts have no meaningful protection against the certification of cases that are unfair and unworkable.

Such an approach is comprehensible only if one views class certification as an insignificant procedural decision that has little substantive effect. It requires a belief that the costs of erroneous certification decisions are negligible and that mistakes are readily corrected. As we next discuss, however, those views are profoundly mistaken.

II. ERRONEOUS CLASS CERTIFICATION CAUSES EXTENSIVE HARM TO DEFENDANTS AND TO ABSENT CLASS MEMBERS

"The class certification order (granting or denying class status) is the most important decision in a class action case: for the plaintiffs, it means the life or death of their pursuit of their claims; for the defendants, it means a very close line between almost zero liability and so much liability that settlement is the only option." Aimee G. Mackay, *Appealability Of Class Certification Orders Under Federal Rule Of Civil Procedure 23(f): Toward A Principles Approach*, 96 NW. U. L. REV. 755, 798 (2002). The reasons for this phenomenon are obvious: "the specter of huge damage awards against defendants in a class action suit and the expense of litigating these large suits in a system without cost-shifting frequently led defendants to settle even marginal cases, with the settlement often including substantial attorneys' fees for the class lawyers." Linda Silberman, *The Vicissitudes of the American Class Action – With a Comparative Eye*, 7 TUL. J. INT'L & COMP. L. 201, 205 (1999).

"[T]hat defendants would rather settle large class actions than face the risk, even if it be small, of crushing liability from an adverse judgment on the merits is widely recognized." Michael E. Solimine & Christine Oliver Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f)*, 41 WM. & MARY L. REV. 1531, 1546 n.74 (2000); see also *id.* at 1546 (observing that class certification "has a huge impact on the subsequent course of the litigation"). Two leading commentators summarized "what most class action lawyers know to be true: almost all class actions settle, and the class obtains substantial settlement leverage from a favorable certification decision." Bone & Evans, *supra*, 51 DUKE L.J. at 1291-1292; see also Laurens Walker, A *Model Plan to Resolve Federal Class Action Cases by Jury Trial*, 88 VA. L. REV. 405, 410 (2002) (noting that most certified class actions settle and that the number of class action jury trials is "only a handful") (citing

ROBERT H. KLONOFF & EDWARD K.M. BILICH, CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION: CASES AND MATERIALS 362 (2000)).

The immense settlement pressures induced by certification of a large class have been noted by federal judges, including Judge Friendly, who described them as "blackmail settlements." See *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (Posner, J.) (citing HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973)); *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 102 (D.C. Cir. 2002) ("[T]he grant of class status can put substantial pressure on the defendant to settle independent of the merits of the plaintiffs' claims."); *Castano* v. *Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("[C]lass certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low.").

It is not merely the size of a potential jury verdict that makes class certification such a powerful engine of settlement. Because of their sheer mass, class actions are likely to be tried in a manner that is ultimately prejudicial to the defendant and that increases the *likelihood* of an adverse result. See *Castano*, 84 F.3d at 746 ("Aggregation of claims also makes it more likely that a defendant will be found liable and results in significantly higher damage awards."); see also Kenneth S. Bordens & Irwin A. Horowitz, *Mass Tort Civil Litigation: The Impact of Procedural Changes on Jury Decisions*, 73 JUDICATURE 22, 24-25 (1989) (empirical studies showing that, as the number of plaintiffs in a case increases, juries become more likely to find fault and to impose greater damages).

Moreover, as one district judge recently observed, "[o]ne of the interesting side effects of the class action form is that, in some cases, it effectively transfers the burden of proving individual facts from plaintiffs to defendants." *In re Initial Public Offering Secs. Litig.*, 2004 WL 2297401, at *28 n.300

(S.D.N.Y. Oct. 13, 2004). The present case shows this process at work. Here, where reliance is an element of plaintiffs' claims, the certification of a class effectively relieves plaintiffs from the obligation to demonstrate reliance individually. Instead, as the court of appeals suggested, plaintiffs will be able to prove reliance on a classwide basis "through common evidence." App. 64a. If defendants believe that a particular class member did not in fact rely on the alleged misrepresentations, it will now be *defendants'* burden to make that showing as to that particular plaintiff. In a class of this size, the process of trying to rebut, plaintiff-by-plaintiff, the classwide showing of reliance, may simply be overwhelming. This reversal of the ordinary burden makes litigation both more expensive and more risky. It makes settlement far more attractive even if the balance of the evidence favors defendants.

The fact that a certification decision "may be altered or amended before final judgment," FED. R. CIV. P. 23(c)(1)(C), does little to mitigate these risks. In practice, class certifications are rarely modified or undone. See Bone & Evans, *supra*, 51 DUKE L.J. at 1301 ("[I]nitial certification is, as a practical matter, tantamount to final certification for most cases."). A 1995 study found that certification decisions were altered in fewer than two percent of federal cases. See THOMAS E. WILLGING, ET AL., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 180, tbl 132 (1996). For that reason, the settlement leverage conferred by a certification order exists from the moment the order is entered. "Once a certification 'order is issued, the parties can be expected to rely on it and * * * engage in settlement discussions on the assumption that in the normal course of events it will not be altered except for good cause.'" *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 152 (2d Cir. 2001) (Jacobs, J., dissenting) (quoting MANUAL FOR COMPLEX LITIGATION § 30.17, at 223). It is thus cold comfort to suggest that defendants will be able to challenge the factual basis of plaintiffs' Rule 23 allegations at trial, for the certification decision itself

renders the chance of a trial remote. Moreover, even if the class is ultimately decertified once the facts become known, the correct result is reached only after a substantial waste of judicial and party resources.

Defendants are not the only group threatened by ill-considered certification decisions. Rule 23 is designed to protect absent members of the purported class, as well as defendants; the rule seeks to ensure that the named plaintiff adequately represents and vindicates the interests of those who are not there. See *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 625 (1997). Those absent plaintiffs will be bound, for better or for worse, by the outcome of the class action:

> If the named plaintiff loses in court, then all of the members of the class have lost and cannot relitigate their claims. Some people who might never even have known about the lawsuit and who certainly never participated in it will suddenly find themselves denied access to the court system, on the theory that they were already represented by the named plaintiffs who litigated the action on their behalf.

John Bronsteen & Owen Fiss, *The Class Action Rule*, 78 NOTRE DAME L. REV. 1419, 1420 (2003). The protections that Rule 23 was meant to provide for absent class members are undermined when certification rests only on allegations, rather than true findings. The fate of absent members is hitched to the class representatives without any serious inquiry into whether their interests are actually aligned. This represents an abdication of the district court's responsibility "in a sort of fiduciary capacity," to protect the absentees' fundamental due process rights. *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability Litig.*, 55 F.3d 768, 784 (3d Cir. 1995).

What is ultimately at stake in this case is whether the procedures associated with class certification should be made to correspond with the actual importance of certification decisions. Giving plaintiffs a free pass at the certification stage while reserving the hard questions for trial ignores the fact that, in

modern class action litigation, certification itself is often the crucial event, the decision on which the ultimate outcome of the case will turn. In light of the profound substantive effects that erroneous certification brings, there is simply no justification for conferring the benefits of certification on the named plaintiffs and their attorneys without first requiring them actually to demonstrate that theirs is a case that the governing rules really allow to proceed as a class action. To conclude otherwise, as the Eleventh Circuit did here, undermines the rule of law. See George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEGAL STUD. 521, 547 (1997); cf. Bronsteen & Fiss, *supra*, 78 NOTRE DAME L. REV. at 1426 (Rule 23 "requires the judge to make a *judgment* before she allows the case to proceed on a class basis") (emphasis added).

And, although other courts have construed Rule 23 to require a more searching analysis (see Pet. 13-15), the liberal venue provisions of the statutes that typically give rise to large-scale federal class actions (RICO and the federal securities laws, in particular) make it easy for plaintiffs to bring cases in those districts that permit certification without looking behind the allegations of the complaint. Cf. *Deposit Guaranty Nat'l Bank* v. *Roper*, 445 U.S. 326, 339-340 (1980). The opportunities for such forum shopping make it especially urgent for this Court to set a uniform national standard that requires district courts to act as genuine gatekeepers at the class certification stage.

The alterative – leaving the split unresolved and allowing plaintiffs to bring class claims in whatever jurisdictions make certification most likely – is an invitation to frivolous class action litigation, with all of the social and economic harms that such litigation brings. Because settlements induced by class certification are so frequently "divorced from the parties' underlying legal positions," *Hevesi* v. *Citigroup Inc.*, 366 F.3d 70, 80 (2d Cir. 2004), an overly deferential certification standard all but encourages plaintiffs to file marginal class action suits. For, even if a claim has little chance of success if tried, it is still likely to extract a lucrative settlement once a class is certified. Plaintiffs can therefore be confident that any

flaws in their allegations will not be exposed until a trial that will probably never come. Cf. *Visa Check*, 280 F.3d at 151 (Jacobs, J., dissenting) ("[I]f the district court later finds that a trial is unmanageable, the named plaintiffs and their counsel lose nothing, but in the meantime they have in hand the means to extract a favorable settlement of what may be weak claims.").

The prospect of a greater volume of questionable class actions litigation threatens severe consequences that extend far beyond any particular case.[4] Meritless class actions are economically inefficient; they "waste[] capital and unfairly transfer[] money from those who have earned it to those who have not." *Ronconi* v. *Larkin*, 253 F.3d 423, 428 (9th Cir. 2001). This increases the costs of doing business in this country, putting U.S. companies at a competitive disadvantage and deterring foreign companies from investing here. See Robert Mednick & Jeffrey Peck, *Proportionality: A Much-Needed Solution to The Accountants' Legal Liability Crisis*, 28 VAL. U. L. REV. 867, 910 (1994) ("Frivolous Rule 10b-5 class action litigation puts American companies on an uphill slope against companies in Japan and Europe that do not face this perpetual burden of litigation."); Michael A. Schneider, *Foreign Listing and the Preeminence of the U.S. Securities Exchanges: Should the SEC Recognize Foreign Accounting Standards?*, 3 MINN. J. GLOBAL TRADE 301, 315-316 (1994) (observing how foreign issuers are often deterred "from raising capital or listing

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[4] Class action litigation is already on the rise. Although statistics are not easy to come by, all empirical data suggest that class actions are playing an increasingly prevalent role in the federal judicial system. See Solimine & Hines, *supra*, 41 WM. & MARY L REV. at 1543 & n.62 ("[I]t appears that parties – mainly plaintiffs – are increasingly seeking to certify such classes."); Mackay, *supra*, 96 NW. U. L. REV. at 755 & n.2. One survey of Fortune 500 companies estimated that, between 1988 and 1998, the number of class actions rose by 338 percent in federal court. *High Flyers*, Editorial, WALL ST. J., June 26, 2000, at A46.

securities in the United States" because they do not want to "subject themselves to * * * U.S. class action suits").

What is more, the fear of liability often causes firms to change the way they do business – often in ways that benefit neither the company nor society. "Companies are deterred from engaging in socially beneficial activities for fear of being targeted. Moreover, high stakes class litigation can threaten to bankrupt a socially valuable firm. And the time spent dealing with frivolous cases harms companies by diverting valuable management resources from more productive uses." Bone & Evans, *supra*, 51 DUKE L.J. at 1302. Indeed, companies frequently "adjust to the threat of liability by doing less. *Not* innovating is a remarkably easy thing to do." PETER HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 155 (1st ed. 1990). And products not pulled from the shelves often become more expensive as businesses pass the costs of litigation on to their customers. In these ways, class actions, typically brought in the name of the American consumer, ironically end up hurting the very constituencies they purport to help.

III. INTERLOCUTORY REVIEW OF A CLASS CERTIFICATION DECISION MAY BE REQUIRED TO ADDRESS THE CIRCUIT SPLIT

The fact that petitioners seek interlocutory relief should be no obstacle to granting the petition. The Court will have few, if any, opportunities to resolve the circuit conflict through the review of a final judgment for the very reason that erroneous class certifications create enormous pressure to settle and rarely culminate in a litigated judgment on the merits. If the circuit split is not resolved through this Court's review of a decision on an interlocutory appeal under Rule 23(f), it will almost certainly linger, causing confusion for litigants and courts alike.[5]

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[5]The petition should be granted, as well, to decide an issue of exceptional importance that will resolve an extraordinarily complex case of overriding importance to a critical industry. "In some instances, the interlocutory status of the case may be no impediment

The court of appeals allowed petitioners to pursue an interlocutory appeal under Rule 23(f) of the Federal Rules of Civil Procedure. That rule, enacted in 1998, gives appellate courts discretion to "permit an appeal from an order of a district court granting or denying class certification." FED. R. CIV. P. 23(f). Such appeals are analogous to the appeals authorized by 28 U.S.C. § 1292(b). See FED. R. CIV. P. 23(f) advisory committee notes. And this Court has certainly not hesitated to review interlocutory judgments made by appellate courts under that provision. See, *e.g.*, *Norfolk Southern Ry.* v. *James N. Kirby, Pty Ltd.*, 125 S. Ct. 385 (2004); *Breuer* v. *Jim's Concrete of Brevard, Inc.*, 538 U.S. 691 (2003) (denial of motion to remand case to state court); *Murphy Bros., Inc.* v. *Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999) (same); *Chan* v. *Korean Air Lines, Ltd.*, 490 U.S. 122 (1989) (denial of motion for partial summary judgment); *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643 (1980) (denial of motion to declare an agreement to fix credit terms illegal per se under the Sherman Act). There is no reason not to follow a similar practice under Rule 23(f) with respect to class certification decisions – especially given that the framers of the rule deliberately created a *more favorable* procedure for interlocutory review than that authorized by Section 1292(b). FED. R. CIV. P. 23(f) advisory committee's notes.

The passage of Rule 23(f), which greatly mitigated the effect of this Court's decision in *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978), represents a considered policy judgment that interlocutory appeals may be needed to prevent the harmful effects of improper class certification. In enacting the rule, the advisory committee recognized that an order granting class certification "may force a defendant to settle rather than incur the costs of defending a class action and run the risk of poten-

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to certiorari where the opinion of the court below has decided an important issue, otherwise worthy of review, and Supreme Court intervention may serve to hasten or finally resolve the litigation." ROBERT L. STERN, ET AL. SUPREME COURT PRACTICE § 4.18, at 260 (8th ed. 2002).

tially ruinous liability." *Ibid.* When that happens, of course, there is no appealable final judgment and any errors made in the certification decision will go uncorrected.

Rule 23(f) thus highlights the importance of getting certification decisions right "at an early practicable time," FED. R. CIV. P. 23(c)(1)(A), rather than waiting until the end of litigation when it will likely be too late to correct erroneous certification decisions. It recognizes that, if appellate courts wait for a final judgment before deciding important legal questions arising under Rule 23, many of those questions will escape review altogether. See *Hevesi*, 366 F.3d at 80-81. That result not only would work an injustice on parties (defendants or plaintiffs, as the case may be) harmed by erroneous certification decisions, but also would frustrate the consistent development of the law.

Rule 23(f) provides an avenue for appellate review of decisions that would otherwise escape such review, as a matter of practical reality; the rule thereby allows future litigants to benefit from the development and clarification of the law through the appellate process. See *Blair* v. *Equifax Check Services, Inc.*, 181 F.3d 832, 835 (7th Cir. 1999). Such clarification sorely needed here; indeed, the fact that Rule 23(f) was not enacted until 1998 may well be one reason that the fundamental issue presented by this case has not previously been resolved by this Court. And the reasons why interlocutory appeals are fully justified in the intermediate federal appellate courts are likewise reasons why this Court should not hesitate to review an otherwise certworthy decision just because it is interlocutory.

CONCLUSION

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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In the Supreme Court of the United States

UNITEDHEALTH GROUP, INC., *et al.*,

Petitioners,

v.

LEONARD J. KLAY, M.D., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF EXXON MOBIL CORPORATION AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

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STATEMENT PURSUANT TO RULE 29.6

There is no parent corporation or publicly held corporation that has a 10% or greater ownership interest in Exxon Mobil Corporation.

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SUMMARY OF ARGUMENT

The court of appeals' decision sets a dangerous precedent for certifying class actions based on the allegations of the complaint alone, without any rigorous inquiry into whether individual questions will overwhelm the alleged common questions. The court of appeals' decision also deepens existing circuit splits on two substantial and critical questions in class action law: (1) whether courts should certify a class based solely upon the allegations in the complaint or whether courts should conduct a "rigorous" inquiry into the requirements of Rule 23 as described in *General Telephone Company of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982), a question upon which there is now a 5-4 split; and (2) whether plaintiffs in a fraud case can satisfy the predominance requirement of a Rule 23(b)(3) action when every plaintiff must individually prove the element of reliance in order to make its case, a question that likewise presents a 5-4 split. The Eleventh Circuit's decision comes down on the wrong side of both of those splits, and therefore creates an excellent vehicle in which this Court may resolve both of those substantial and recurring questions of law.

First, the circuit courts are in conflict over the basic question of whether a court must conduct a "rigorous" inquiry into the factual and legal allegations of the complaint in determining class certification. The court of appeals below, like three other circuit courts, adopted what is, in essence, a pleading standard for class certification, ignoring evidence that individual issues will predominate over the *alleged* common issues. This is flatly contrary to this Court's precedent, which requires that a district court "rigorous[ly]" inquire into whether a plaintiff's claim satisfies the prerequisites of Rule 23. *See Falcon*, 457 U.S. at 161. It is also of utmost significance here, because the court's failure to test the factual allegations of plaintiff's fraud claims resulted in certification of a sprawling RICO class action brought on behalf of all doctors throughout the country against practically the entire managed care industry. *See Klay v.*

Humana, Inc., 382 F.3d 1241, 1246 (11th Cir. 2004) ("This is a case of almost all doctors versus almost all health maintenance organizations."), *petition for cert. filed*, 73 U.S.L.W. 3260 (Oct. 19, 2004) (No. 04-522).

In practice, the court of appeals' pleading standard takes discretion under Rule 23 away from the district court and places it in the hands of the plaintiffs' attorney. The court of appeals' decision invites attorneys to plead their way into class certification, because the factual allegations of the complaint must be accepted as true, even with regard to the facts implicating class certification.

Second, the court of appeals' decision also deepens a square and acknowledged circuit conflict over the question whether plaintiffs in a fraud case can satisfy the predominance requirement of Rule 23(b)(3) when every plaintiff must individually prove reliance. The decision below allows certification of a fraud action based upon the face of the pleadings, even when individual questions of reliance lie at the crux of the case. Although the court of appeals conceded that each of the plaintiffs would have to prove his or her reliance upon the defendants' representations, the court of appeals relieved that burden by holding that the jury could rely upon generalized evidence to find reliance on a classwide basis. By lowering the plaintiff's burden, the court of appeals' decision contravenes this Court's admonition that Rule 23 not modify a plaintiff's substantive cause of action.

The court of appeals' decision threatens to alter the course of class certification law and will lead to certification of unwieldy class actions that are alleged to comply with Rule 23, but in fact do not. Because these cases involve inherently individualized issues, there is no way that they could be tried without substantially abridging defendants' due process and jury rights. Exxon Mobil respectfully submits that it is time for this Court to step in and clarify that mere review of the complaint does not

constitute the rigorous inquiry mandated under this Court's jurisprudence.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECISION DEEPENS A CIRCUIT SPLIT OVER THE PROPER STANDARD OF INQUIRY INTO THE REQUIREMENTS OF FEDERAL RULE OF CIVIL PROCEDURE 23.

This Court has made clear that "[t]he class-action device was designed as an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Falcon*, 457 U.S. at 155 (internal quotation omitted). The use of this exceptional procedure is defined and limited by Rule 23: "[O]f overriding importance, courts must be mindful that the Rule ... sets the requirements that they are bound to enforce.... The text of [the Rule] ... limits judicial inventiveness." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). Thus, this Court has held both that the merits of an individual claim bear no relevance to whether the claim can be maintained as a class action, *see Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-79 (1974), and that, before certifying a class, a trial court must determine, "after a rigorous analysis, that the prerequisites of Rule 23 have been satisfied." *Falcon*, 457 U.S. at 161.

To satisfy this "rigorous analysis" requirement, the trial court must find "actual, not presumed conformance" with the prerequisites of Rule 23, *id.* at 160. That did not happen here. To the contrary, the court of appeals aligned itself with other circuits that read this Court's holding in *Eisen* to preclude virtually *any* analysis of the factual issues necessary to class certification. Thus, the Second, Ninth, and Tenth Circuits have held that *Eisen*'s prohibition on inquiring into the merits also precludes inquiry beyond the allegations of the complaint and precludes fact finding at the certification stage. *See* Pet. 15-17

(discussing cases).[2] On the other side of the split, the First, Third, Fourth, Fifth, and Seventh Circuits have faithfully reconciled *Eisen* and *Falcon*, *see* Pet. 13-15 (discussing cases):[3] *Eisen* bars a court from putting a thumb on the scales of certification for meritorious claims, or a thumb on the scales of decertification for frivolous claims. What *Eisen* does not prohibit is what *Falcon* requires: that a court fulfill its obligations under Rule 23 to rigorously inquire whether the plaintiff has satisfied the requirements for a class action.

The divide in the circuits goes beyond mode of analysis. The court of appeals' failure to conduct a rigorous certification inquiry was outcome dispositive here, as it will be for almost any cleverly pleaded fraud claim. Had the court of appeals below applied *Falcon* and tested the plaintiffs' allegations, instead of adopting them, the class could not have been certified in the face of defendants' evidence that individual issues overwhelm any alleged common ones.

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[2] *See, e.g.*, *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 135 (2d Cir. 2001); *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 292-93 (2d Cir. 1999); *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1290 n.7 (10th Cir. 1999); *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 691 F.2d 1335, 1342 (9th Cir. 1982); *Blackie v. Barrack*, 524 F.2d 891, 901 n.7 (9th Cir. 1975).

[3] *See, e.g.*, *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 365-66 (4th Cir. 2004); *Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 220 (5th Cir. 2001); *Johnston v. HBO Film Mgmt., Inc.*, 265 F.3d 178, 189 (3d Cir. 2001); *Szabo v. Bridgeport Mach., Inc.*, 249 F.3d 672, 675-77 (7th Cir. 2001); *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 298 (1st Cir. 2000).

A. This Court Has Precluded Inquiry Into The Substantive Merits Of A Complaint But Required A Rigorous Inquiry Into Whether The Plaintiff's Claim Is Maintainable As A Class Action Under Rule 23.

In *Eisen*, this Court found "nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." 417 U.S. at 177. The district court there had held a hearing on the merits of the case in order to determine whether the *defendants* should bear the costs of providing notice to potential class members. *See id.* Because the "petitioner was 'more than likely' to prevail on his claims," the district court imposed 90% of the notice costs on the defendants, thus "allowing a representative plaintiff to secure the benefits of a class action without first satisfying the requirements for it," *i.e.*, the requirements of notice and manageability. *Id.*

This Court rejected the district court's analogy between a class action and a preliminary injunction. *See id.* at 168. The question in determining the propriety of a class action is whether the requirements of Rule 23 are met, not whether the plaintiff is likely to prevail on the merits. By refusing to pay the costs of notice, the plaintiff had failed to satisfy the requirements of maintaining a class action, and the Court ordered the class action dismissed. *Id.* at 179.

Eisen itself thus makes clear that the plaintiff bears the burden of satisfying the requirements of Rule 23. Nothing in the Court's opinion, however, precludes a court from testing the plaintiff's allegations insofar as they bear upon whether the plaintiffs can satisfy the strictures of Rule 23, *e.g.*, whether the class is sufficiently numerous, Fed. R. Civ. P. 23(a)(1), whether the plaintiffs have alleged common questions of law and fact, *id.* 23(a)(2), whether plaintiffs can demonstrate that common

questions predominate over individualized ones, *id.* 23(b)(3), and the like.

Were there any room for doubt upon this point, this Court's subsequent decision in *Falcon* made this point perfectly clear:

> Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and his *otherwise unsupported allegation* that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims.

457 U.S. at 157 (emphasis added). Thus, the Court held that a court can separate the merits of an individual's claim from the class certification decision, because the requirements of the class action turn on manifestly different standards. Rule 23 is not concerned with the likelihood that either the individual's or the class's claims will succeed. Therefore, evidence that a claim is meritorious, like that considered by the *Eisen* district court, does not "necessarily justify the additional inferences" that the claim is typical, pervasive, or common to a class. *Falcon*, 457 U.S. at 158.

Reversing the district court, the *Falcon* Court observed that the plaintiff had relied upon different evidentiary approaches in attempting to prove his individual and class discrimination claims. *See id.* at 159. This was far from efficient and was directly attributable to the district court's "failure to evaluate carefully the legitimacy of the named plaintiff's plea that he is a proper class representative under Rule 23(a)." *Id.* at 160. The Court recognized that certification considerations "are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action,'" but nonetheless held that a court

must "probe behind the pleadings" to determine whether the requirements of Rule 23 are met. *Id.* (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978)). "[A]ctual, not presumed, conformance with Rule 23" is "indispensable." *Id.*

Falcon and *Eisen* thus create two rules: (1) the merits of a plaintiff's individual claim have no bearing on whether the claim is maintainable as a class action, and (2) a trial court must go beyond the pleadings and conduct a "rigorous analysis" to determine whether the plaintiff has satisfied the requirements of Rule 23. Both reinforce the fundamental principle that the requirements of Rule 23 must be satisfied in order to maintain a class action. And only if a court rigorously enforces Rule 23 will the class action rule serve its intended objectives.

B. A "Pleading Standard" For Certification Creates An Unwarranted Conflict Between This Court's Decisions In *Eisen* And *Falcon*.

The court of appeals upheld certification of this sprawling RICO class action only by accepting plaintiff's allegations as true. This pleading standard, which is now applied in four circuits, *see supra* note 2, requires that a court ignore evidence demonstrating that individual issues overwhelm plaintiffs' claims, merely because that evidence contradicts the conclusory factual allegations of the complaint. Here, plaintiffs alleged claims on behalf of every physician who has treated any health care patient who is a member of any health care plan insured by any of the defendant managed care companies. Individual issues exist (not surprisingly) in such a sprawling action, because managed care companies have entered into hundreds of thousands of contracts with physicians nationwide, and those contracts vary significantly on material payment terms, including the applicable state law. *See* Pet. 6 & n.5. Defendants' evidence demonstrated that individual doctors relied upon the payment terms in their own contracts with the managed care companies and did not rely upon generalized

representations that they would be paid pursuant to a different reimbursement policy, as the complaint alleged. *See id.* at 7.

The court of appeals nonetheless held that common questions predominate based on the allegations in the complaint. The plaintiffs alleged that defendants conspired to underpay doctors nationwide, *see Klay*, 382 F.3d at 1256. ("[A]ll of the defendants operate nationwide and allegedly conspired to underpay doctors across the nation, so the numerous factual issues relating to the conspiracy are common to all plaintiffs."), and that defendants made the same misrepresentations about reimbursement policies to all physicians, *see id.* at 1259 ("The alleged misrepresentations in the instant case are simply that the defendants repeatedly claimed they would reimburse the plaintiffs for medically necessary services they provide to the defendants' insureds...."). In fact, the physician contracts contained materially different payment terms and defendants made *different* representations to physicians nationwide, as defendants' evidence demonstrated. The court of appeals simply ignored that evidence in favor of generic, overbroad allegations that all defendants represented to all physicians at all times that they "would honestly pay physicians the amounts to which they were entitled." *Id.* at 1258.

This is a far cry from the "rigorous analysis" this Court held was essential in ensuring that the prerequisites of Rule 23 are satisfied. Assuming the validity of a complaint's factual allegations may be appropriate to a Rule 12(b)(6) motion to dismiss, but it is not appropriate on a certification determination that is normally the district court's last word on the subject. *See Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675-76 (7th Cir. 2001) (Easterbrook, J.). A judge must conduct the inquiries identified in Rule 23 in order to exercise proper discretion. *Eisen* requires that the court assume the merits of the claim, but it does not require that a court assume the commonality or typicality of claims. And *Falcon* squarely prohibits such assumptions.

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Eleventh Circuit's decision violates this Court's precedent and the Rules Enabling Act, and creates an additional reason for this Court's intervention in the case.

A. By Modifying the Plaintiff's Burden, The Court Of Appeals' Decision Violates The Rules Enabling Act.

In its zeal to affirm certification of the class action below, the court of appeals modified the substance of plaintiff's underlying cause of action, and in so doing, contravened this Court's precedents. The Eleventh Circuit recognized that established precedent requires each plaintiff individually to prove reliance, but the court nonetheless held that class members could evade that requirement based upon a presumption of reliance. The Rules Enabling Act prohibits federal courts from modifying the substantive cause of action to achieve class certification, however.

This Court has emphasized, time and again, that Federal Rule of Civil Procedure 23 is a procedural device that may not modify a plaintiff's underlying substantive cause of action. The Rules Enabling Act requires that the civil rules "not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). The statute "underscores the need for caution" so as to ensure that judicial interpretation of Rule 23 does not "ignore the Act's mandate." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 844 (1999); *see also Amchem*, 521 U.S. at 613 (same). A court may not alter the elements of a plaintiff's cause of action so as to fit the underlying action into the procedural confines of Rule 23. The Eleventh Circuit, however, committed this precise error: in one breath, it recognized plaintiffs' need to prove individualized reliance and in another absolved them of that requirement so as to permit common elements to predominate under the class.

It is well established that where, as here, a civil RICO claim is predicated upon mail or wire fraud, the plaintiffs must

demonstrate reliance like any other fraud plaintiff. The RICO statute provides a civil remedy only to those persons who are injured "by reason of" racketeering activity. 18 U.S.C. § 1964(c). A civil RICO plaintiff "only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985). Therefore, as the Eleventh Circuit itself held, "reliance may not be presumed in fraud-based RICO actions; instead, the evidence must demonstrate that each individual plaintiff actually relied upon the misrepresentations at issue." *Klay*, 382 F.3d at 1257.

The Eleventh Circuit held that "reliance may not be presumed" in this case, but it nonetheless licensed the jury to make such a presumption on behalf of the tens of thousands of doctors who would make up the putative class. *Id.* at 1259 ("A jury could quite reasonably infer that guarantees concerning physician pay ... go to the heart of these agreements, and that doctors [i.e., all the doctors] based their assent upon them."). This case involves more than half a dozen separate defendants, charged with making numerous different statements to the thousands of members of the class throughout the country. The court held, however, that plaintiffs had no obligation to demonstrate that a single plaintiff actually relied upon a single misstatement made by a single defendant. Rather, the court held, the jury might infer that every class member relied upon the defendants' statements, because the statements all "conveyed essentially the same message—that the defendants would honestly pay physicians the amounts to which they were entitled." *Klay*, 382 F.3d at 1258. By holding that a jury could presume that every class member relied upon the defendants' statements, the Eleventh Circuit relieved the plaintiffs of their burden to demonstrate actual reliance. In so doing, the court enlarged and modified plaintiffs' statutory rights under the guise of class certification. This is contrary to *Ortiz* and *Amchem*, and the Rules Enabling Act.

B. This Court's Intervention Is Necessary To Prevent Plaintiffs From Forum-Shopping Multi-State Class Actions To The Most Lax Judicial Circuits.

The court of appeals' decision is not only mistaken, but it also deepens an established split among the circuits that is ripe for this Court's resolution. Because plaintiffs increasingly rely upon the class action rule to adjudicate actions involving plaintiffs and defendants from multiple States, there is a corresponding need for nationwide uniformity with respect to the basic requirements of Rule 23. Otherwise, plaintiffs may forum shop at will so as to select the circuit with the most lax class certification rules in an effort to force the defendants to settle or else defend against an unwieldy class action overwhelmed by individual questions.

As the Eleventh Circuit observed, the plaintiffs in this case seek to resolve, through one civil action, a purported dispute between all doctors and all health maintenance organizations throughout the country. *Klay*, 382 F.3d at 1246 ("This is a case of almost all doctors versus almost all health maintenance organizations."). Although plaintiffs brought this action in the Southern District of Florida, they could have just as easily brought the case in virtually any federal district court throughout the United States.

It is no surprise that the plaintiffs did not bring this action in a district court within the Second, Fourth, Sixth or Eighth Circuit. In those circuits, the requirement that civil RICO plaintiffs demonstrate reliance on an individualized basis would have been outcome-determinative of plaintiffs' class action motion. The Eleventh Circuit has now joined three others in lowering the threshold for class actions arising out of fraud claims by affirmatively modifying the underlying cause of action. The decision below deepens the existing division among the circuits and expands the opportunities for forum-shopping plaintiffs.

The nationwide impact of class certifications makes this continuing conflict intolerable. Because plaintiffs have almost plenary discretion to choose the federal circuit in which to litigate the cause of action, the continuing split between the circuits over the availability of fraud claims means that defendants who operate throughout the country will basically be held hostage to the lower, and erroneous standards, of those who favor class actions. This Court's intervention is warranted.

CONCLUSION

This Court should grant the petition for writ of *certiorari* and set the case for full briefing and oral argument.

Respectfully submitted,

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